85-445

Supreme Court, U.S.
FILED
AUG 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PETER DEFAZIO, ET AL, PETITIONERS,

V.

THE CITY OF SPRINGFIELD BY AND THROUGH THE SPRINGFIELD UTILITY BOARD, ET AL,

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a case or controversy within the meaning of Article III of the United States Constitution was before the Court when the record did not contain all the contractual documents upon which the declaration of rights was requested?

2. Whether declaratory relief can be granted upon a contract that is incomplete by its own terms?

3. Whether the court has the power to deny discovery of documents relevant to petitioners theory of the case?

LIST OF PARTIES

The parties to the proceedings in the court where judgment is sought to be reviewed are:

1. Petitioners and Intervening Defendants: Peter DeFazio, Glen Sofge, George Edward Obrian, Emmitt Meeks, Shirley Meeks,

Paul Stewart, Frederick V. Simmons and John Montgomery and Peter Powers;

2. Plaintiff, City of Springfield;

3. Defendants: Washington Public Power Supply System, Eugene Water and Electric Board, Bonneville Power Administration, Washington Utilities Group (Public Utility District No. 1 of Benton County, Washington; Public Utility District No. 1 of Chelan County, Washington; Public Utility District No. 1 of Clallam County, Washington; Public Utility District No. 1 of Clark County, Washington; Public Utility District No. 1 of Cowlitz County, Washington; Public Utility District No. 1 of Douglas County, Washington; City of Ellensburg, Washington; Public Utility District No. 2 of Grant County, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; Public Utility District of Klickitat County, Washington; Public Utility District No. 1 of Mason County, Washington; City of Seattle, Washington; Public Utility

District No. 1 of Okanogan County, Washington; Public Utility District No. 2 of Pacific County, Washington; Public Utility District No. 1 of Skamania County, Washington; City of Tacoma, Washington), Portland General Electric Co., Pacific Power and Light Co., Columbia Rural Electric Association, Inc.; the 17 defendants (City of Burley, City of Centralia, Clearwater Power Company, Elmhurst Mutual Power & Light, Glacier Electric Cooperative, City of Heyburn, Idaho County Light & Power, Town of McCleary, Northern Lights, Inc., Ohop Mutual Light, Okanogan County Electric Cooperative, City of Port Angeles, Prairie tower Cooperative, City of Rupert, Rural Electric Cooperative, Unity Light & Power, Wells Rural Electric Company), Lewis County Public Utility District 1, Mason County Public Utilities District 3, the City of Seattle, Central Lincoln Peoples' Utility District, Claskinie Peoples' Utility District, Tillamook Peoples' Utility District, Northern Wasco

Peoples' Utility District, and Surprise Valley Electrification Corporation.

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THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

PETER DEFAZIO, ET AL., PETITIONERS,

V. THE CITY OF SPRINGFIELD, BY AND THROUGH THE CITY OF SPRINGFIELD, ET AL.,

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT L. ACKERMAN, Ackerman, DeWenter & Huntsberger, P.C., on behalf of Peter DeFazio, et al, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals of the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 752 F2d 1423. The opinions of the District Court are reported at 564 F. Supp. 86 (pre-trial motions) and 564 F. Supp.

90 (on the merits).

JURISDICTION

The judgment of the Court of Appeals (App. A, Infra 1A) was entered on May 31, 1985. A petition for rehearing was denied on May 16, 1985 (App. B, Infra, 1B - 2B). The jurisdiction of this court is invoked under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2 of the United States Constitution provides in relevant part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . to Controversies to which the United States shall be a party; - to Controversies between two or more states; - between a State and citizen of another State; - between Citizens of different States; . . ."

2. 28 USC 2201 provides:

> "In a case of actual controversy within its jurisdiction . . ., any court of the United States, upon the filing of an appropriate

> pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

STATEMENT OF FACTS

1. The City of Springfield, acting by and behalf of its local utility board, filed a claim for declaratory relief alleging that "uncertainty and controversy" existed over the authority of Oregon public utilities to enter into contracts, referred to as "net billing agreements" executed by the Bonneville Power Administration (BPA), the Washington Public Power Supply System (Supply System), and over 100 public and cooperative utilities throughout the Pacific Northwest.

2. Plaintiff joined all signatories to those agreements as defendants.

These contracts involve the financing and construction of three nuclear power plants located in the state of Washington. These

projects are referred to as Projects 1, 2 and 3 of the Supply System.

3. The BPA filed crossclaims and counterclaims seeking a declaratory judgment that all parties to net billing agreements have authority to enter those agreements.

4. On February 14, 1983, the trial court established a trial management schedule. It did not provide for discovery (App. C, Infra., 1 C). The schedule also established the following:

(a) Motions for Intervention must be filed by March 21, 1983;

(b) Oral argument on objections to intervention were set for March 28, 1983;

(c) Motions for summary judgment must be filed by March 28, 1983;

(d) Oral arguments on summary judgment were set for April 22, 1983;

5. On March 15, 1983,the trial court

ruled in pre-trial motions that "Federal common law governs this case." 564 F. Supp. at 88.

6. Petitioners motion to intervene as ratepayers was allowed on March 29, 1983.

7. Petitioners moved the trial court to amend the trial management schedule to provide for discovery.

8. On March 29, 1983 the trial court denied petitioner's motion to amend the trial management schedule. (App. D, Infra, 1D).

9. Petitioners moved the court to continue the summary judgment proceedings and establish a discovery conference pursuant to Fed. R. Civ. P. 26(f) for the production of documents requested in the motion and that the parties admit or deny the truth and genuiness of such documents at the discovery conference. This motion was based upon the proposition that state law rather than "federal common law," applied to the capacity of the parties to enter into the net billing agreements. The

court previously ruled that federal common law controlled the case. 564 F. Supp. at 88.

10. The trial court completed the Summary Judgment proceedings and issued an opinion upholding the agreements on the basis of "federal common law" on April 27, 1983. 564 F. Supp at 93, 94. The judgment of the trial court was entered on May 16, 1983 and dismissed the other claims in the preceeding which included petitioner's Motion for a Continuance of the summary judgment proceedings (App E, Infra 4E).

11. Subsequently, the Washington and Idaho Supreme Courts held that the public utilities in those states lacked authority to enter into similar agreements (Participants Agreements) that involved the financing and construction of nuclear projects 4 and 5 of the Supply System. See Chemical Bank v. WPPSS, 99 Wash 2d 772, 666 P2d 329, (1983), (Chemical Bank I), and Asson v. City of Burley, 105 ID 432, 670 P2d 839 (1983).

The Supreme Court of Oregon upheld those agreements with respect to the Oregon public utilities, DeFazio v. WPPSS, 296 Or 550, 679 P2d 1316 (1984). The Washington Supreme Court released all participants from their obligations under the Participants Agreement, Chemical Bank v. WPPSS, 102 Wash 2d 874, 691 P2d 524 (1984). (Chemical Bank II).

12. The Court of Appeals for the Ninth Circuit found that the authority of the participants to enter the agreements was a question of state law. 752 F2d at 1428. The court, however, found that the agreements were power sales agreements which were valid under state law. Id at 1429.

13. The three net billings and the Participants Agreement contain common language regarding the payment of the bonded indebtedness of the Supply System that is used to construct the five nuclear plants. The Supply System shall use its "best efforts" to finance the construction of the nuclear plants

by the issuance of its bonds pursuant to a "Bond Resolution." Each of the agreements "...shall be subject to the terms and provisions of... the Bond Resolution." The Supply System bills each participant its share of construction costs that have been financed from bond proceeds. Each participant must pay the Supply System unconditionally, without set off and "whether or not" the projects or projects "are completed, operable or operating...".

14. The bond resolutions are specifically and expressly incorporated as part of the net billing agreements. They are not a part of the record in this case. The trial court denied discovery on that issue. The Court of Appeals held that discovery was "not relevant to the issues presented." 752 F2d at 1427.

15. The impact of the bond resolutions upon the agreements may characterize the net billing agreements as a device for the security of bonds rather than a power sales

agreement. Applying state law, the net billing agreements may be invalid as to Washington participants. See Chemical Bank v. WPPSS, (Chemical Bank I), supra., and Idaho participants, see Asson v City of Burley, supra. All the participants may have a claim to be released from the net billing agreements under state law, Chemical Bank v. WPPSS, (Chemical Bank II), supra.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the validity of certain net billing agreements which were used to finance three nuclear projects in the state of Washington. The Court of Appeals held that state law applies to determine whether public participants had the power to execute the contracts, however, that court concluded that the agreements were power sales agreements which were valid under state law. This conclusion rests upon the major premise that

all the evidence was before the court upon which a declaration could be made regarding the characterization of the net billing agreements.

This case involves substantial issues of jurisdiction and the discretionary power of the court to grant declaratory relief upon an incomplete factual record. The denial of discovery is contrary to precedent and substantially departs from the usual course of judicial proceedings and requires the exercise of supervision by this Court.

1. The Court of Appeals and the trial court failed to consider that Article III, Section 2 of the United States Constitution requires that a case or controversy must be presented before a judgment can be made under the Declaratory Judgments Act. The issue of justicability is jurisdictional and can be raised at any time, McGrath v. Kristensen, 340 US 162, 167, 71 S Ct 228, 95 Led 173, 179 (1950), although petitioners raised this issue

below (Appellant's Brief, p. 17). A justicable controversy under the Declaratory Judgments Act "manifestly has regard to the [Article III] constitutional provision and is operative only in respect to controversies which are such in the constitutional sense." Aetna Life Ins. Co. v. Haworth, 300 US 227, 240, 57, S Ct 463, 81 Led 617, 621 (1936). The controversy must lead to specific relief through "a decree conclusive in character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts." 300 US at 241.

In the present case, each of the net billing agreements were subject to the bond resolutions of the Supply System by their own terms. These documents were not before the court. They were essential to the characterization of the net billing agreements because they provide the mechanism under which the Supply System was obligated to use its best efforts under the net billing agreements to finance nuclear plants 1, 2 and

3. It was this financing aspect that invalidated the similarly worded Participants Agreements that involved Supply System projects numbers 4 and 5 under state law in Chemical Bank v. WPPSS, (Chemical Bank I), supra., and Asson v. City of Burley, supra., and provided the basis for the release of all participants to those agreements. Chemical Bank v. WPPSS, (Chemical Bank II), supra.

This incomplete record lead the trial and appellate court to a hypothetical finding that the net billing agreements were power sales agreements.

A controversy "must be definite and concrete," in order to meet the Article III standard. Aetna Life Ins. Co. v Haworth, 300 US at 240. The lack of an adequate factual record does not present a case in adversial terms and leads to hypothetical results. National Conference of Catholic Bishops v Smith, 653 F2d 535, 540 (DC Cir 1981).

Therefore, the trial and appellate courts granted declaratory relief on an incomplete record. Neither court had jurisdiction under Article III, Section 2 of the United States Constitution because all the documents which were incorporated within the net billing agreements were not before the court for adjudication.

2. The incomplete nature of the factual record has been previously discussed. The federal courts do not have a duty under the Declaratory Judgment Act to provide declaratory relief. The Act is an authorization, not a command. Declaratory adjudications should rest "on an adequate and full bodied record". Public Affairs Associates v. Rickover, 369 US 111, 113, 82 S Ct 580, 582, 7 Led 2d 604, 607 (1962). Declaratory relief cannot be based upon an unsatisfactory factual record. Id at 114.

3. The lack of an adequate record in this case is a direct result of the trial

court's denial cf discovery to petitioners.

The denial of discovery is contrary to the rule in the Ninth Circuit in Summary Judgment proceedings. In Portland Retail, etc. v. Kaiser Foundation, 662 F2d 641 (9th Cir 1981). The court held that a party against whom a summary judgment is filed, "must be afforded...an opportunity to respond." This requires that "sufficient time be afforded for discovery necessary to develop facts essential to justify [a party's] opposition to the motion..." (Case citations ommitted) Id at 645. In Portland Retail the defendant's motion for summary judgment was filed on the day discovery was concluded by the pre-trial order. The Summary Judgment proceedings increased the scope of the proceeding. There was no opportunity for discovery. In the present case petitioners were allowed to intervene the day after motions for Summary Judgments were to be filed. (App. C, Infra 2C). Petitioners

timely motions to amend the trial management schedule and postpone the Summary Judgment proceedings were denied.

The denial of discovery was unprecedented and is contrary to the philosophy of the Federal Rules of Civil Procedure. FRCP 1 provides that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action." The pre-trial deposition and discovery mechanisms are recognized as "one of the most significant innovations of the Federal Rules of Civil Procedure." The objective of the discovery rules is "to obtain the fullest possible knowledge of the issues and facts before trial." The discovery rules are "to be accorded a broad and liberal treatment" in order to provide knowledge of all relevant facts essential to proper litigation." Hickman v. Taylor, 329 US 495, 500, 501, 507, 67 S Ct 385, 389, 392, 91 Led 451, 457, 460 (1947).

The denial of discovery departs substantially from the usual course of judicial proceedings and requires the supervisory powers of this court. The court's trial management schedule (App. C, Infra 2C) did not provide for discovery. Petitioners moved the court to amend the trial management schedule to provide discovery. Petitioners moved to continue the summary judgment proceedings in order to provide discovery of documents which included the bond resolutions that were incorporated within the net billing agreements. Petitioners suggested that the trial court convene a discovery conference pursuant to Fed.R.Cir.P. 26(f) at which time the truth and genuineness of the requested documents could be admitted or denied in order to expedite the discovery process. At this time the trial court, in pre-trial motions, ruled that "Federal common law governs this case" 564 F. Supp. at 88. Petitioners' request for discovery was based upon the

application of state law on the capacity of the parties to execute the net billing agreements. Petitioners' motions were denied. That issue was certainly relevant especially when the Court of Appeals found that state law, rather than federal common law, applied to the capacity of the parties to contract, 752 F2d at 1428. The Court of Appeals compounded the error when it found that such a request for discovery was "not relevant to the issues presented for summary judgment." Id at 1427.

CONCLUSION

Petitioners have been denied their right to discovery which lead to an incomplete record, jurisdictional error, and a substantial departure from the usual course of judicial proceedings. The court below departed from the decisions of this court on the first two questions presented and its own precedent on the third question presented. The

petitioners' writ of certiorari should be issued.

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CERTIFICATE OF MAILING

I hereby certify that the foregoing Petition for Writ of Certiorari was served this 13 day of September, 1985 by United States mail, by depositing three true copies of said petition with postage prepaid thereon in the United States Post Office in Springfield, Oregon addressed to each of the following parties:

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 83-3927
No. 83-4024
DC #. CV 82-1387-RE

THE CITY OF SPRINGFIELD, a municipal corporation, acting by and through the Springfield Utility Board,

Plaintiff-Appellee,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation, et al,

Defendants-Appellees,

v.

MASON COUNTY PUBLIC UTILITY DISTRICT NO. 3 and LEWIS COUNTY PUBLIC UTILITY DISTRICT NO. 1.,

Intervening Defendants-Appellants.

JUDGMENT

APPEAL from the United States District Court for the Portland District of Oregon

THIS CAUSE came on to be heard on the Transcript of the Record from the United

States District Court for the Portland District of Oregon and was duly submittted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed: May 31, 1985, 9:08 a.m.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 83-3927
No. 83-4024
DC No. CV 82-1387 RE
Oregon (Portland)

THE CITY OF SPRINGFIELD, etc.,

Plaintiff-Appellee,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, etc,; CITY OF EUGENE; BONNEVILLE POWER ADMINISTRATION, etc., PETER JOHNSON, etc., et al.,

Defendants-Appellees,

v.

PETER DeFAZIO, et al,

Intervening Defendants-Appellants.

ORDER

Before: KENNEDY and FERGUSON, Circuit Judges, and WILLIAMS, * District Judge.

The panel as constituted in the above case has voted unanimously to deny the

petition for rehearing. Judges Kennedy and Ferguson voted to reject the suggestion for a rehearing en banc and Judge Williams recommended the denial of the en banc request.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

* Hon. David W. Williams, Senior United States District Judge for the Central District of California, sitting by designation.

Filed, May 10, 1985, Phillip B. Winberry, Clerk, U.S. Court of Appeals

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

CIVIL MINUTES-GENERAL

Case No. 82-1387-RE

Date: February 14, 1983

Title: CITY OF SPRINGFIELD v. W.P.P.S.S.

Docket Entry

Record of status conference:

Order setting the following schedule:

see below

Present:

Hon. JAMES A. REDDEN, JUDGE

M. Hartzell, Deputy Clerk

J. Harris, Court Reporter

Attorneys Present for Plaintiffs:

Peter Mersereau

Attorneys Present for Defendants:

(List attached)

PROCEEDINGS:

2/18 cutoff for filing limited answers or motions to dismiss

2/18 responses due

3/7 replys due

3/14 10:30 AM Oral Argument on motions to dismiss. BRIEFS ON MOTIONS TO DISMISS LIMITED TO 10 PAGES

3/21 Motions to Intervene to be filed

3/25 objections to be filed

3/28 9:30 AM Oral Argument

3/28 Motions for Summary Judgment

4/7 responses due

4/14 replys due

4/22 9:30 Oral Argument

APPENDIX D

CIVIL MINUTES-GENERAL

Case No. 82-1387-RE

Date: March 29, 1983

Title: CITY OF SPRINGFIELD v. W.P.P.S.S.

Present: Hon. JAMES A. REDDEN, JUDGE

M. Hartzell, Deputy Clerk

DOCKET ENTRY

The motion for intervention by Springfield ratepayers is GRANTED. The answer, counterclaim, and cross-claim of intervenors shall be deemed filed as of March 28, 1983. Other parties shall have until April 4, 1983 to plead to the counterclaim and cross-claim.

Motions for summary judgment were due yesterday, March 28, 1983. Responses to those motions are due April 7. 1983. Intervenors may raise their arguments either by way of response to the pending summary judgment motions on April 7, or by way of cross motions

filed on that date. Replies or responses to those briefs will be due April 14. Intervenors shall have right of final reply on April 18, 1983. Argument shall remain scheduled for April 22, 1983 at 9:30.

Intervenor's motion to delay proceedings is DENIED. If intervenors contend that there are issue of fact which preclude summary judgment, they shall assert such an argument in their filings, stating with specificity the facts outstanding and the nature of the discovery required for their resolution. If the court concludes that there are such issues, a time for discovery will be set.

The motions of Puget Sound and Washington Water Power to enlarge time and to dismiss will be decided without argument on April 12, 1983. Responses to those motions will be due April 8, 1983 and reply, if any, shall be due April 11, 1983.

Plaintiff's motion to dismiss the

cross-claims of Alder Mutual, Parkland and Douglas County is GRANTED, and these claims are dismissed without prejudice.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Civil No. 82-1387-RE

THE CITY OF SPRINGFIELD, a municipal corporation, acting by and through the Springfield Utility Board,

Plaintiff

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation; CITY OF EUGENE, BONNEVILLE POWER ADMINISTRATION, an agency of the United States Government; PETER JOHNSON, Administrator of the Bonneville Power Administration, et al.,

Defendants.

JUDGMENT

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REDDEN, Judge:

This matter came before the Court for consideration of the Motions for Summary Judgment filed by the City of Springfield, the Bonneville Power Administration (BPA) and Peter Johnson, BPA Administrator, the Washington Public Power Supply System (WPPSS), and Pacific Power and Light Company, the response thereto, the Motions to Dismiss or to stay on justiciability or abstention grounds, and the responses filed thereto. The Court having heard oral argument, having considered the entire record herein, and having rendered in writing its Opinion and Order on April 27, 1983,

Based upon the Court's Opinion and Order, IT IS HEREBY ORDERED AND ADJUDGED:

1. That all signatories to the net billing agreements pertaining to the construction of WPPSS plants 1, 2 and 3 and the Trojan Nuclear Plant had lawful authority

to enter into those agreements;

2. That the Motions for Summary Judgment be and hereby are granted to the extent consistent with this Court's Opinion and Order of April 27, 1983;

3. That the Motions to dismiss or to stay based upon the issues of justiciability or abstention be and hereby are denied; and

4. That any and all other claims raised in this litigation, to the extent not embodied in the Court's Opinion and Order of April 27, 1983, be and hereby are dismissed without prejudice.

DATED this 16 day of May, 1983.

James A. Redden
United States District Judge

Filed May, 16, 1983, Robert M. Christ, Clerk

No. 85-445 (2)

FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PETER DEFAZIO, ET AL.,

PETITIONERS,

V.

THE CITY OF SPRINGFIELD BY AND THROUGH THE SPRINGFIELD UTILITY BOARD, ET AL.

RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CITY OF SPRINGFIELD, ACTING BY AND THROUGH THE SPRINGFIELD UTILITY BOARD, IN OPPOSITION TO PETITION FOR CERTIORARI

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PARTIES TO THE PROCEEDING

The Petition for Certiorari sets forth the parties to this proceeding. This Brief in Opposition to Petition for Certiorari is submitted by the City of Springfield, Oregon, acting by and through the Springfield Utility Board, which is a respondent herein and was a respondent below. This respondent does not have any subsidiaries or other affiliates.

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STATEMENT OF THE CASE

On November 15, 1982, the City of Springfield, Oregon, acting by and through the Springfield Utility Board ("Springfield"), filed a declaratory judgment suit for the limited purpose of determining the validity of certain contracts entered into between the Board, the Bonneville Power Administration ("BPA") and the Washington Public Power Supply System ("Supply System") for power from Supply System Nuclear Projects Nos. 1, 2 and 3.[1/] These three-party agreements are known as "net billing agree-

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1/ Springfield also requested a declaration as to the validity of a separate agreement executed by Springfield, BPA and certain other Northwest utilities providing for the construction and operation of a fourth nuclear plant, the Trojan Nuclear Power Project, located in the state of Oregon.

ments." Believing that they were "interested" parties within the meaning of 28 U.S.C. § 2201(a), Springfield joined as defendants all public and private utility participants which had executed similar or identical agreements. These included BPA, the Supply System, four investor-owned utilities, and over 100 Northwest public utilities.

Springfield filed its complaint after an Oregon state trial court had invalidated Springfield's execution of a separate contract (known as the "participants agreement") concerning two additional Supply System nuclear plants, Project Nos. 4 and 5. The aforesaid state court decision had been rendered in October, 1982 in the case known as Peter DeFazio, et al., v. The Washington Public Power Supply System, et al., Lane County Civ. No. 16-81-11344 (filed December 21, 1981).

The participants agreements differed materially from the net-billing agreements in that they embodied two-party agreements between the respective Northwest utilities and the Supply System, and did not include BPA as a contracting party. Nonetheless, because the participants agreements invalidated by the state trial court on authority grounds contained similar language to the net billing agreements, and further because of the potential personal liability of the individual Springfield Board members under Oregon law for entering into contracts found to be ultra vires, Springfield filed the within declaratory suit.

The petitioners herein, individual ratepayers residing in the City of Springfield, Oregon, requested and received leave to intervene in the declaratory suit after the district court had established an expedited trial schedule, and after

numerous answers and motions to dismiss had been filed. Pet. App. 3-C. Most of these same petitioners were also plaintiffs of record in the aforesaid DeFazio state court lawsuit. As articulated in their moving papers, the petitioners' purpose for intervening in the within declaratory suit was to prevent this case from impairing the favorable decision they had just obtained in the Oregon trial court.

Following the filing of briefs and scheduling of oral argument, the district court entered summary judgment sustaining the validity of the net billing agreements on May 16, 1983. Pet. App. 4-5E. Petitioners' counsel had been present when the various schedules were established by the district court. Following the rendition of summary judgment, the petitioner ratepayers and two Washington public

utility districts [2/] perfected an appeal with the Ninth Circuit Court of Appeals. Significantly, these same Washington PUDs chose not to join the ratepayers in their petition to this Court.

Prior to the affirmance by the Ninth Circuit Court of Appeals of the district court's award of summary judgment (Pet. App. 1-2A) in May of 1985, the Oregon Supreme Court reversed the aforesaid state trial court decision in the case of DeFazio v. Washington Public Power Supply System, et al., 296 Or. 550, 679 P.2d 1316 (1984). On numerous grounds, the Oregon Court held that Springfield and the other Oregon parties to the Project 4/5 participants agreements were in fact authorized under the applicable constitutional, charter and statutory provisions to have

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2/ Mason County PUD No. 3 and Lewis County PUD No. 1.

executed those agreements in 1976. As is discussed below, the rendering of this decision effectively eliminated any colorable authority challenge the Springfield ratepayers may ever have had to Springfield's net billed contracts.

REASONS FOR DENYING THE WRIT

1. Finding ample support in borrowed state law, the Ninth Circuit Court of Appeals agreed with the result reached by the district court that Springfield and the other utility participants to the net billing agreements had full legal authority to execute them. 752 F.2d at 1429. This conclusion was compelled by the court's interpretation of the unambiguous terms of the net billing agreements as constituting power sales contracts (that is, that the utilities pay only for power they receive), which conclusion itself was compelled by the threshold finding that

BPA bore the so-called "dry hole risk" associated with the construction of these projects.

The petitioners at bar contend that had the district court considered additional documentary evidence associated with the net billing agreements (namely, the bond resolutions), it may have construed those agreements otherwise, with the ultimate result under state law that the agreements would be invalid as to certain participants. Pet. at 8-9.[3/] For the reasons that petitioners' arguments lack substance, and petitioners themselves lack standing to raise them, this Court should deny the petition.

3/ Petitioners also argue that a "case or controversy" within the meaning of Article III of the Constitution was not before the district court in this matter. Springfield contends that the record contains ample evidence of a requisite case or controversy and petitioners' contention in this regard is clearly without merit.

2. Other than reciting a series of "what if" scenarios, petitioners offer no specific explanation of how the presence of the subject bond resolutions in the trial court record would have compelled a different result in that court on the basic authority issue. Since the utilities were contractually obligated to pay only for power they received from BPA, the courts below correctly construed these agreements as power sales contracts. Indeed, those courts relied exclusively on the contractual role played by BPA in these agreements in reaching that conclusion. Manifestly, nothing in the bond resolutions diminishes BPA's role in the contracts, and petitioners have not so argued.

In addition, the changes in the judicial landscape since these same petitioners first joined the suit have placed them in a decidedly incongruous position

before this Court. Indeed, petitioners raise no authority arguments under Oregon state or local law, and instead advance authority claims which might have been legitimately raised only by the two Washington utilities which appealed the district court decision. No such petition by these utilities has been filed.

3. Whatever standing Springfield ratepayers might have to challenge a contract entered into between Springfield and other parties must arise out of and reasonably relate to that contract -- not the contracts of other parties.

> "Second, even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. E.g., Tileston v. Ullman, 318 U.S. 44, 87 L. Ed. 603, 63 S. Ct. 493 (1943) . . . .

> Without such limitations -- closely related to Art. III concerns but essentially matters of judicial self-governance -- the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." (Citation omitted). (Emphasis supplied). Warth v. Seldin, 422 U.S. 490, 45 L. Ed. 2d 343, 355, 95 S. Ct. 2197 (1975).

Under the prevailing law of Oregon, Springfield's net billing agreement is immune from challenge on authority grounds. Since the Supreme Court in Defazio v. Washington Public Power Supply System, supra, held that Springfield had authority to execute the participants agreement regarding Projects 4 and 5 -- to which BPA was not a party -- then a fortiori, Springfield had authority to execute the net billing agreements to which BPA was a party. Indeed, the petitioners have not argued to the

contrary. Instead, petitioners suggest that if the net billing agreements were ruled invalid as to Washington and Idaho participants, 4/ then all participants "may" have a claim to be released from their respective net billing agreements. Pet. at 9.

In sum, the petitioner ratepayers are inappropriately advancing contract claims of parties which have themselves rejected such a challenge.

4/ See Chemical Bank v. WPPSS, et al., 99 Wash. 2d 772, 666 P.2d 329 (1983); Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983). Petitioners' reliance on these decisions is misplaced. Both the Washington and Idaho Supreme Courts, in voiding the 4/5 participants agreements as to certain Washington and Idaho participants on authority grounds, expressly noted significant differences between those agreements and the net billing agreements at bar. See Chemical Bank v. WPPSS, supra, 666 P.2d at 332-333; Asson v. City of Burley, supra, 670 P.2d at 844.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

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No. 85-445

In the Supreme Court of the United States

OCTOBER TERM 1985

PETER DEFAZIO, et al.,
Petitioners,

v.

THE CITY OF SPRINGFIELD,
by and through
THE SPRINGFIELD UTILITY BOARD, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al.

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THE CITY OF SPRINGFIELD,
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Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al.[1]

The petition does not disagree with the result reached by the court of appeals and by the district court. Rather, petitioners contend that discovery should have been ordered under Fed R Civ P 56(f) before those courts decided legal issues presented by the cross-motions for summary judgment. The petition meets none of the standards for review by this Court. In addition, the federal and regional interest in preserving the decision of the court of appeals is enormous. The petition is mischievous as well as insubstantial.

[1] These respondents are identified as parties in the petition (at ii and iii). WPPSS and PGE have no parent companies, subsidiaries or affiliates. The following companies are affiliated with PACIFICORP, dba PACIFIC POWER & LIGHT COMPANY:
(footnote carried forward)

STATEMENT OF THE CASE

The action was filed November 15, 1982 by the City of Springfield, Oregon, to determine the validity of its net billing agreements with Bonneville Power Administration and Washington Public Power Supply System for power from Supply System Nuclear Projects 1, 2 and 3 (App A). Springfield joined as defendants all parties with an interest in those projects, including BPA, the Supply System, four large private utilities, and over 100 Northwest public utilities. The source of Springfield's concern was litigation in the Oregon state courts in which petitioners and others attacked the validity of participants' agreements between various public utilities and the Supply System

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(Footnote continued)

Second-tier Subsidiaries
NERCO, Inc.

Third-tier Subsidiaries
Pacific Telecom, Inc.

Fourth-tier Subsidiaries
American Network, Inc.
Associated P & C Engineers, Inc.
Constant Broadcasting Company
Flight Dynamics, Inc.
Gem State Utilities Corporation
Multi Visions, Inc.
Norcom Construction, Inc.
International Communications Services, Inc.
Pacific Telecom Construction
Ron Morris Construction Company
Sertel, Inc.
Tel Com Construction Company
Northwestern Telephone Systems, Inc.
Shared Use Network Services, Inc.

alone for power from Nuclear Projects 4 and 5. Similar litigation was pending in state courts in Washington and Idaho.

The Oregon litigation had raised concern over the validity of the net billing agreements, and over the value of $6 billion of Supply System bonds which had been sold to finance Nuclear Projects 1, 2 and 3. That concern created impediments to further financing of Projects 2 and 3, which were under construction. Accordingly, the parties sought an expedited resolution of the controversy.

The district court promptly held status conferences and established a schedule to resolve jurisdictional issues and motions for summary judgment which some of the parties wished to file (Pet App C). Counsel for petitioners attended the status conferences, but delayed until the last day allowed by the court to file a petition to intervene. When he did so, petitioners made no effort to accommodate the court's schedule, but tried to extend the proceedings with a series of motions seeking delay (Pet App D.) Their stated reason for intervening was to protect their position in the litigation in state court, so that a decision in this case would not "impact or affect" their attack on Springfield's participants' agreements for power from Nuclear Projects 4 and 5 (App B).

The district court denied petitioners' motions to rearrange its schedule, and imposed on them the same timetable it had imposed on the other parties. The court also offered them discovery if they should show

it was needed (Pet App D). When they failed to do so, the court on May 16, 1983 entered summary judgment sustaining the validity of the net billing agreements (Pet App E).

Thereafter, the Washington and Idaho Supreme Courts held in pertinent part that the participants' agreements for power from Nuclear Projects 4 and 5 were not power sale contracts, and were not authorized by the laws of those states because the utilities carried the risk of project failure (the so-called "dry hole risk") and might have to pay large sums without receiving any power. *Chemical Bank* v. *WPPSS*, (1983) 99 Wash 2d 772, 666 P2d 329; *Asson* v. *City of Burley*, (1983) 105 Id 432, 670 P2d 839, *cert denied* (1984) 105 S Ct 219. Both courts distinguished the net billing agreements relating to Nuclear Projects 1, 2 and 3 from the participants' agreements. 666 P2d at 332-33; 670 P2d at 344. The Washington court, citing the district court's opinion in this case, noted that the net billing agreements "apparently may be characterized as contracts for the purchase of power" in which BPA has given an "indirect guaranty" against the dry hole risk. 666 P2d at 332-33. The Idaho court went even farther, and held that its decision was not applicable to the net billing agreements, "even by analogy." 670 P2d at 850.

In 1984 petitioners lost their case in the Oregon courts. The Oregon Supreme Court held that the participants' agreements for power from Nuclear Projects 4 and 5 were authorized under Oregon law. *DeFazio* v. *WPPSS*, (1984) 296 Or 550, 679 P2d 1316.

While the district court relied on federal law to sustain the net billing agreements, the court of appeals concluded that the issue should be decided by borrowing state law [2] and referred to *Chemical Bank* and *Asson* for its standards. See 752 F2d at 1427-28; 564 F Supp at 95. In the end, this made no difference. Both courts concluded that the net billing agreements, as a matter of general contract interpretation, impose the dry hole risk on BPA and do not obligate the utilities to pay for power they do not receive. Consequently, those agreements are power sales contracts, which nobody denies are authorized by any applicable state law. 752 F2d at 1429; 564 F Supp at 95.[3] There was no fact issue which required discovery, and summary judgment was appropriate. 752 F2d at 1427.

REASONS FOR DENYING THE PETITION

1. Simply stated, the question is whether this Court should review the decision of both the district court and the court of appeals declining to order discovery of the bond resolutions (and other documents that petitioners do not discuss). Petitioners contend (Pet 13-17) [4] that this was a departure from "the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to

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[2] These respondents contended in both courts below that the net billing agreements are federal contracts, and are controlled by and are valid under federal law. If the petition should be granted, they will assert that position in this Court, which

(footnote carried forward)

call for an exercise of this Court's power of supervision." See Rule 17.1(a). Yet, despite the importance of the case to BPA and the entire Pacific Northwest, the only ruling complained of was made by both lower courts and concerns the narrow issue of whether petitioners made a sufficient showing under Fed R Civ P 56(f) to delay a decision on the motions for summary judgment. No question of legal moment is raised, and the petition turns on the peculiar facts of this single case.

In *Appalachian Power Company* v. *American Institute,* (1959) 4 L Ed 2d 30 Justice Brennan refused to stay a court of appeals mandate, because

> "* * * ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be re-

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(footnote continued)
would provide an alternative ground for affirming the court of appeals.

[3] The court of appeals' decision of an issue of state law is a poor candidate for certiorari. "* * * [A]challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring* v. *Prosise,* (1983) 462 US 306, 314 n.8.

[4] There is no precedent for petitioners' unusual argument that this was not a case or controversy for lack of evidence of the bond resolutions (Pet 10-13). In *Nat. Conference of Catholic Bishops* v. *Smith,* (D.C. Cir. 1981) 653 F2d 535 the complaint was dismissed for failing to allege the elements of a controversy and because there was no showing of any regulatory impact on plaintiffs. 653 F2d at 539-40. *Smith* does not remotely resemble this case.

> viewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts." 4 L Ed 2d at 32.

See also United States v. *ITT Continental Baking Co.*, (1975) 420 US 223:

> "* * * [T]he issue of whether there were any violations concerns only a particular order as applied to a discrete set of facts and therefore would not merit this Court's grant of a petition for certiorari." 420 US at 227 n.2.

2. The *DeFazio* decision [5] sustained the authority of Oregon public utilities to enter into the participants' agreements under which the utilities carried the dry hole risk. That decision foreclosed any substantial criticism of the net billing agreements of Oregon utilities, and petitioners do not express doubt about the authority of *their* utility, the City of Springfield, Oregon, to enter into the net billing agreements. They suggest only that the agreements of Washington and Idaho utilities may be invalid, despite the contrary observations by the supreme courts of those states, and, if so, that several hundred net billing agreements — including Springfield's — may be avoided under principles of commercial frustration. [6]

Petitioners expressed no interest in such a deter-

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[5] *DeFazio* v. *WPPSS, supra,* (1984) 296 Or 550, 679 P2d 1316.

[6] *See Chemical Bank* v. *WPPS,* (1984) 102 Wash 2d 874, 691 P2d 524, *cert denied* (1985) 105 S Ct 2140.

mination when they entered this case and should not be allowed to assert one now. As Springfield ratepayers, they have no standing to attack the validity of hundreds of contracts between other persons on such an attenuated basis, particularly now that Springfield's contracts are plainly valid. *See Davis & Farnum Mfg. Co* v. *Los Angeles,* (1903) 189 US 207, 219-221; *Williams* v. *Eggleston,* (1898) 170 US 304, 309.

3. Petitioners are less than frank in suggesting that they do not know the contents of the bond resolutions. The affidavit of their counsel states that he has seen the bond resolutions for Nuclear Projects 4 and 5 and has "reason to believe" that the resolutions for Nuclear Projects 1, 2 and 3 "read the same" and bear "the same legal interpretation" (App C). He does not even attempt to suggest how those documents might qualify the plain terms of the net billing agreements, which both the district court and the court of appeals found to be unambigous. Counsel's failure to explain the significance of any of the bond resolutions to the issues of this case destroys any credibility that might otherwise attach to the petition. Petitioners have not demonstrated a need for the documents that would justify further proceedings. *See ISI Corporation* v. *United States,* (9th Cir 1974) 503 F2d 558, 559.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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October 11, 1985

APPENDIX A

(The Complaint)

Plaintiff City of Springfield, acting by and through the Springfield Utility Board (hereinafter referred to as "Springfield") brings this action for a declaratory judgment against Defendants and for other relief, and states as follows:

PARTIES

1. Plaintiff Springfield is a municipal corporation organized and existing under the laws of the State of Oregon.

2. Defendant Washington Public Power Supply System (hereinafter referred to as "Supply System") is a municipal corporation of the State of Washington organized as a joint operating agency under RCW 43.52 and is the owner of Washington Public Power Supply System Nuclear Projects 1 and 2 and is a part owner of Project 3 (hereinafter referred to as "Projects"). The said projects are presently under construction.

3. Defendant City of Eugene, acting by and through the Eugene Water and Electric Board (hereinafter "EWEB") is the owner of 30% of the Trojan Nuclear Project (hereinafter referred to as "Trojan") and, as the owner of said project, has executed a three-part Net Billing Agreement with the United States Government, acting by and through the Bonneville Power Administration, and with various Participants. EWEB's interests in Trojan may be affected by a declaration of this Court.

4. Defendant Peter Johnson is the Administrator of Defendant Bonneville Power Administration (hereinafter referred to as "Bonneville"), an agency of the United States Department of Energy which has executed net-billing contracts with the Supply System relating to Projects 1, 2 and 3, and with EWEB and certain participants relating to Trojan. Bonneville's interests in the Projects and Trojan may be affected by a declaration of this Court.

5. The Washington Water Power Company, Puget Sound Power & Light Company, Portland General Electric Company and Pacific Power & Light Company (hereinafter collectively referred to as "investor-owned utilities") are corporations organized in Washington, Oregon and Maine, respectively, each of which has executed an ownership agreement as of August 17, 1973 with the Supply System relating to Project 3. In addition, Defendants Portland General Electric Company and Pacific Power & Light Company have ownership interests in 70% of Trojan. A declaration in this case may affect the interests of said investor-owned utilities.

6. Defendants City of Milton-Freewater and City of McMinnville are Oregon municipalities and were defendants in that certain lawsuit entitled *Peter DeFazio, et al* v. *Washington Public Power Supply System, et al,* Lane County Circuit Court Case No. 16-81-11344. Defendants City of Drain, Canby Utility Board, a subdivision of the City of Canby, the City of Bandon, the City of Cascade Locks are each municipalities of

the State of Oregon and were plaintiffs in the aforesaid *DeFazio* case. Each of said Defendants herein are bound by the judgment of the Lane County Circuit Court in the *DeFazio* case and have interests that may be affected in one or more of Projects 1, 2 and 3 and Trojan by this Court's declaration.

7. Defendants herein, Central Lincoln Peoples' Utility District, Northern Wasco Peoples' Utility Dis-Peoples' Utility District, are municipal corporations and peoples' utilities districts authorized by Article XI, Section 12 of the Oregon Constitution and organized under chapter 261, Oregon Revised Statutes. Each of the aforesaid Defendants were third party defendants in the *DeFazio* case and have interests which may be affected in one or more of Projects 1, 2, 3 and Trojan by a declaration of this Court.

8. The plaintiffs and defendants referred to in paragraphs 6 and 7 are referred to hereafter as Oregon Public Participants.

9. The other Defendants named in the caption but not referred to above (hereinafter referred to as "Non-Oregon Public Participants") are entities organized in the states indicated in the caption, each of which has executed Net Billing Agreements or Participants' Agreements pertaining to one or more of the projects, and Trojan. A list of the respective Participants involved in each of the Projects and Trojan is attached as Exhibit "A" and incorporated herein by reference. Each of said Non-Oregon Public Participants may be

affected by a declaration of this Court by a finding that Oregon Participants lacked authority to enter into Projects 1, 2, 3 and Trojan and may increase their Participants' share up to 25% pursuant to the Net Billing Agreements. Each such Defendant has the legal capacity to sue and be sued in its own name. It is anticipated that some of such Defendants may wish to align themselves as Plaintiffs rather than Defendants in this action, and the Plaintiff therefore requests the Court to make an appropriate realignment of the parties pursuant to their requests.

JURISDICTION AND VENUE

10. This Court has jurisdiction of this matter under 28 U.S.C. § 1331.

11. This Court is a proper venue for this action, under 28 U.S.C. § 1391, in that one or more of the Defendants resides in this district and Plaintiff's cause of action arose, in whole or in part, in this district.

FIRST CLAIM FOR RELIEF

The Facts

12. On or about October 5, 1970, Springfield, among other Participants more particularly described in Exhibit "A", entered into a three-party Net Billing Agreement relating to Trojan with Defendant EWEB and Defendant Bonneville. A copy of said three-party Agreement is attached as Exhibit "B" and incorporated herein by reference.

13. On or about the following dates, Springfield entered into Net Billing Agreements with the Supply System and Bonneville relating to the designated Projects:

Project No. 1 — 2/6/73;
Project No. 2 — 1/4/71;
Project No. 3 — 9/25/73.

Copies of the three foregoing Agreements are attached as Exhibits "C," "D," and "E," respectively, and incorporated herein by reference. Said Agreements are identical to ones entered into by the other Participants at or near the same dates set forth above.

14. Pursuant to its obligations incurred under the three-party Agreement relating to the Trojan Project, Springfield has been paying its percentage share of Project capability as designated in said Agreement. Since March, 1980, December, 1976, and May, 1982, respectively, Springfield has been paying its percentage share of the construction costs for Washington Nuclear Power Projects 1, 2 and 3 as provided for in the attached Net Billing Agreements.

15. Plaintiff contends that at all material times, it had full legal authority to execute the Net Billing Agreements relating to the Projects and the three-party Agreement relating to Trojan.

16. On July 14, 1976, Plaintiff and Oregon Public Participants and Non-Oregon Public Participants entered into a Participants' Agreement with the Sup-

ply System relating to the construction of Washington Nuclear Projects 4 and 5. A copy of this Participants' Agreement is attached as Exhibit "F" and incorporated herein by reference.

17. On December 17, 1981, the above-referenced *DeFazio* action was filed in the Lane County Circuit Court, Oregon, wherein certain plaintiffs sought a declaration by said Court that the aforesaid Plaintiff and Oregon Public Participants lacked legal authority to execute the Participants' Agreement relating to Projects 4 and 5.

18. On November 5, 1982, the Honorable George J. Woodrich, Lane County Circuit Court Judge, entered certain Findings of Fact and Conclusions of Law in said suit, including the following

(a) "The obligations of Municipal Participants under the Participants' Agreement constitute 'debts,' 'indebtedness' or 'liabilities' as those terms are used in the charters of Municipal Participants.

(b) The obligations of Municipal Participants under the Participants' Agreement exceeded their respective debt limitations and are not exempt therefrom by virtue of the special fund doctrine or any other principle of law. The Participants' Agreement is a guaranty of another (WPPSS) obligation (bonds) to be paid from the revenues of the municipality and without legal ownership, adequate control or

limitations upon the projects and in potential amounts that are the practical equivalent of a general tax on the people of the municipality.

(c) Municipal Participants do not have statutory or charter authority to enter into such guaranty, security relationship or pledge, nor do they have statutory or charter authority to exercise extramural powers.

(d) No Oregon statute authorizes the execution of the Participants' Agreement.

(e) By entering into the Participants' Agreement, the Municipal Participants became shareholder-investors in WPPSS and Projects 4 and 5 in violation of Article XI, Section 9 of the Oregon Constitution.

(f) By entering into the Participants' Agreement the Municipal Participants raised money for and loaned their credit to WPPSS in Projects 4 and 5 in violation of Article XI, Section 9 of the Oregon Constitution.

(g) By entering into the Participants' Agreement the Municipal Participants unlawfully delegated their legislative powers [of rate making] and the Participants' Agreements constitute an unlawful binding of future councils or boards."

A complete copy of the Findings of Facts and Conclusions of Law entered by Judge Woodrich is attached as Exhibit "G" and incorporated herein by reference.

19. At the time of its execution of the net Billing Agreements on Projects 1, 2 and 3, as well as its execution of the three-party Agreement relating to the Trojan Project, Springfield's payment obligations thereunder were and are substantially the same as its obligations under the Participants' Agreement executed in connection with Projects 4 and 5. The following features, among others, are common to all of the aforesaid Agreements:

(a) The Participants' obligation to pay their percentage share regardless of whether or not the Projects were completed;

(b) A rate covenant requiring the Participants to adjust their respective utility rates to cover their corresponding obligations under the agreements;

(c) The absence, at the time of executing the agreements, of a finite ceiling on the ultimate cost of the projects.

20. Defendants Northern Wasco Peoples' Utility District, Tillamook Peoples' Utility District, Clatskanie Peoples' Utility District and Central Lincoln Peoples' Utility District have taken the legal position in the aforesaid *DeFazio* case that net billed Projects 1, 2, 3 and Trojan are dissimilar from Projects 4 and 5 which are not "net billed" due to the fact that Bonneville has an obligation to make payments upon nonpayment by any Participant under the Net Billed Projects. Defendant Supply System took the contrary legal

position in the *DeFazio* case contending that invalidation of Projects 4 and 5 by the Lane County Circuit Court would invalidate Net Billed Projects 1, 2, 3 and Trojan because Bonneville did not have an obligation of payment in the event of nonpayment by any Participant.

21. ORS 294.100(2) provides as follows:

> Any public official who expends any public money in excess of the amounts, or for any other or different purpose or purposes then authorized by law, shall be civilly liable for the return of the money by suit of the District Attorney of the district where the offense is committed, or at the suit of any taxpayer of such district.

22. By virtue of the foregoing statute, the members of the Oregon Public Participants' Boards will incure substantial personal risk to the extent they continue to make the payments under their contract obligations pursuant to the Agreements as alleged in paragraph 14 hereinabove if said agreements alleged herein are void *ab initio.*

23. For the above reasons, the aforesaid decision by Judge Woodrich in the *DeFazio* case has created uncertainty and controversy over Plaintiffs' and other Oregon Public Participants' obligations under the Net Billing Agreements on Projects 1, 2, 3 and Trojan and their authority to enter into said Net Billing Agreements until this Court declares whether Bonneville has an obligation of payment to Supply System in the event

of nonpayment by an Oregon Public Participant and such obligation exempts said Net Billing Agreements from the *DeFazio* decision.

24. By reason of the above, there is a genuine and justiciable controversy among the parties concerning their respective obligations under the Agreements relating to Projects 1, 2 and 3 and Trojan which will affect the Oregon Public Participants' legal authority in entering into said Agreement *ab initio*.

ALTERNATIVE CLAIM TO DECLARATORY RELIEF

In the alternative, Plaintiff alleges:

25. Realleges paragraphs 1 through 23 of its First Claim.

26. If the appellate courts of Oregon uphold Judge Woodrich's judgment in the *DeFazio* case on appeal, and if this Court finds that Bonneville's statutory authority to pay nonpaying Participants' obligations on the Net Billing Agreements is ambiguous, then Bonneville should be held liable to pay all costs attendant to said Net Billed Projects on behalf of the Oregon Public Participants and to increase its base rates to all its customers in that Bonneville, by its own conduct in entering into said agreements and its public pronouncements thereon, led the Oregon Public participants to believe that in the event of nonpayment by any Participant Bonneville had the duty to do the following:

(a) Attempt to reassign the nonpaying Participants' share to other customers or other Participants willing to accept said assignment; or

(b) Reassign the nonpaying Participants' share to all other Participants in the Project pro rata up to 25%; or

(c) In the event alternatives (a) and (b) above were impossible, Bonneville was to pay said nonpaying Participants' share from its own revenues and increase its rates to all customers thereafter.

Plaintiff and all other Participants relied upon Bonneville's contractual obligations and public pronouncements thereof to their detriment and Bonneville is estopped from claiming it has no duty of payment on behalf of any Participant which legally cannot pay its Participants' share.

WHEREFORE, Plaintiff prays for relief as follows:

(1) For a declaration of this Court that Plaintiff and Oregon Public Participants had full legal authority to enter into the Net Billing Agreements on Projects 1, 2, 3 and Trojan by reason of Bonneville's obligations thereunder.

(2) In the alternative, if Plaintiff did not have the legal authority to enter into the Net Billing Agreements on Projects 1, 2, 3 and Trojan, Bonneville is liable to Supply System to make

such payment and estopped to claim its lack of obligation to do so.

(3) Awarding to Plaintiff reasonable costs and attorneys' fees against Bonneville.

(4) Awarding Plaintiff such other and further relief as may be just and proper.

APPENDIX B

(Affidavit of Petitioners' Counsel Supporting Motion to Intervene)

STATE OF OREGON)
) ss.
County of Lane)

I, Robert L. Ackerman, being first sworn, state that I am the attorney for the potential intervenors in this case. I have reviewed the pleadings filed by the City of Springfield, the Washington Public Power Supply System and the Bonneville Power Administration.

I am the attorney for Peter DeFazio et al (Springfield Ratepayers) in that claim that was filed in Lane County Circuit Court on or about December 21, 1981 against the Washington Public Power Supply System and the City of Springfield, Lane County Circuit Case No. 16-81-11344.

The purpose of that case was to challenge the authority of the City of Springfield to enter into a Participants' Agreement with the Washington Public Power Supply System with respect to the financing of nuclear projects 4 and 5 that were under construction in the State of Washington. Plaintiffs' challenge was based upon the claim that the City of Springfield lacked the Oregon constitutional, statutory and charter authority to enter into the Participants' Agreement.

The City of Bandon, City of Canby, City of Cascade Locks, and the City of Drain intervened as plaintiffs in the *DeFazio* case. All plaintiffs joined in challenging the authority of the Oregon municipal participants to enter into the Participants' Agreement with the Washington Public Power Supply System on constitutional, statutory and charter grounds. The cities of McMinnville and Milton-Freewater intervened in *DeFazio* as defendants.

The *DeFazio* case was concluded by final judgment that held in the plaintiffs' favor that the Participants' Agreement was ultra vires and void based upon a lack of certain constitutional, statutory and charter authority. That case is now on appeal to the Court of Appeals of the State of Oregon.

The Complaint in this case raises issues with respect to net billing agreements entered into between the City of Springfield, the Bonneville Power Administration and the Washington Public Power Supply System with respect to the construction of nuclear projects 1, 2 and 3 in the State of Washington. The Complaint also raises issue with respect to the plaintiffs' net billing agreement with the City of Eugene and the Bonneville Power Administration with respect to the Trojan Nuclear facility. Plaintiff alleges that all parties had full authority to execute those net billing agreements but contends that the obligations of the City of Springfield with respect to those net billing agreements are uncertain because they are similar to the agreements that were invalidated in the *DeFazio* litigation.

The defendants, City of Bandon, City of Canby, City of Cascade Locks and City of Drain, although they were plaintiffs in *DeFazio*, are defendants in this case and have taken the position that the net billing agreements with respect to nuclear projects 1, 2 and 3 with the Bonneville Power Administration, the Washington Public Power Supply System and other signatories to those agreements are valid. Therefore, there is no party in the present case that will represent the interests of the potential intervenors on the Oregon authority issues with respect to the net billing agreements for Projects 1, 2 and 3.

The plaintiff also raises authority issues with respect to this net billing agreement with the Bonneville Power Administration, the City of Eugene and various participants with respect to the Trojan Nuclear Generating facility. There is no party in this case that will represent the interest of the potential intervenors on the Oregon authority issues raised by the plaintiff in that phase of this case.

The Columbia Rural Electric Association, Inc. has raised issues in its pleading with respect to the authority of the Bonneville Power Administration to enter into the net billing agreements for nuclear projects 1, 2 and 3. The potential intervenors intend to join that defendant in those claims, however, that defendant does not have standing to assert the authority issues that will be raised by the potential intervenors with respect to the plaintiff's net billing agreement with the Bonneville Power Administration, the

City of Eugene and various participants with respect to the Trojan Nuclear Generating facility.

The potential intervenors have an interest in the transaction which is the subject of the action by the plaintiff because the plaintiff has alleged that its net billing agreements with respect to nuclear projects 1, 2 and 3 and the Trojan Generating facility are similar to those that were invalidated in *DeFazio*. The potential intervenors have an interest in this litigation in order to establish that the agreements are identical in law and in fact and should be invalidated on the authority issues raised in *DeFazio* or in the alternative, if the agreements are not similar that any finding or conclusion of this Court that the parties had the requisite authority to enter into those agreements is based on a separate factual and legal premise that will not impact or affect the *DeFazio* decision.

All contentions raised by the potential intervenors with respect to the ability of the participants to enter into the net billing agreements that have been raised by the plaintiff's Complaint involve common questions of law and fact.

APPENDIX C

Extract from Affidavit of Petitioners' Counsel Supporting Motion for Continuance

* * * An itemization of the requested documents are attached as Exhibit A. The reasons why they create questions of fact are as follows:

1. *The Bond Resolutions.*

Each of the net billing agreements are subject to bond resolutions. Bond resolutions are part of the net billing agreements and form a contractural relationship between the participants and the bond holders. The rights of the bond holders are defined in the resolution. The bond resolution of the Participants' Agreement give the bond holders certain rights against the Supply System and the participants in the event of a default. The court must construe the entire agreement. The bond resolutions are an integral part of the agreement. The bond resolution may show that the participants are liable for the default of the Supply System. This supports our claim that the net billing agreements constitutes a guarantee that may have been beyond the lawful authority of the participants. I have not had access to the bond resolutions that involve the contracts at issue in this case, but I am familiar with the terms of the bond resolution rising out of the Participants' Agreement. I am familiar with the bond financing scheme under both agreements. Therefore I have reason to believe that the bond resolutions will read the same and be subject to the same legal interpretation.

Supreme Court, U.S.
FILED
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(4)

No. 85-445

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

PETER DEFAZIO, et al.,

Petitioners,

v.

THE CITY OF SPRINGFIELD BY AND THROUGH THE SPRINGFIELD UTILITY BOARD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI SUBMITTED BY EUGENE WATER & ELECTRIC BOARD, CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, CLATSKANIE PEOPLES' UTILITY DISTRICT, AND SURPRISE VALLEY ELECTRIFICATION CORPORATION

[See inside cover for counsel.]

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QUESTION PRESENTED

Whether the trial court abused its discretion, creating prejudice and requiring reversal, when it did not delay proceedings in order to allow intervenors time for extensive discovery even though (1) intervenors never identified any factual issues which required discovery and (2) the only evidence which they now contend should have been considered by the court in reaching its decision consisted of documents which were readily available and which petitioners could have obtained and placed before the court?

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ARGUMENT

Petitioners, who were appellants in the court below, did not argue to that

court that the participants lacked authority, under state law, to enter into the net billing agreements if, when properly construed, those agreements were contracts for the sale of power under which BPA rather than the participants bore the "dry hole risk." As construed by both the District Court and the Circuit Court of Appeals, that is precisely what the net billing agreements were.

Petitioners are now contending that the lower courts' construction of the agreements *might* have been wrong because the bond resolutions, referred to in those agreements, were not made part of the record. That occurred, they argue, because the district court refused to grant their request, when they intervened in the proceeding, to modify the trial management schedule to give them additional time for extensive discovery.

The bond resolutions are documents available to the public. Petitioners have not explained why, if they believed those documents were essential to a correct decision, they did not simply obtain copies and submit them for the district court's consideration.

Petitioners' counsel knew the deadlines in the trial management schedule on February 14, 1983 because on that date he attended the conference at which the management schedule was determined (Excerpt 1129). That schedule allowed until April 7, 1983 for the filing of responses to the motions for summary judgment upon which this case was ultimately decided (Petition, Appendix C). In other words, petitioners had more than seven weeks in which to obtain and place before the court documents which are readily available and which they now claim were essential to a correct decision. At

the expiration of that time, although they asked for a continuance and for massive discovery, they did not explain why they had not been able to obtain copies of the bond resolutions or even suggest that they had made any effort to do so (Excerpt 1015-1027).

The petition attempts to transform that series of events into an occasion for review by this Court when what actually occurred was a proper discretionary ruling by the trial court which, so far as the record shows, caused no prejudice whatsoever.

Petitioners' argument that there was no case or controversy is simply not supported by the record. Extensive briefing to the district court on the summary judgment motions revealed sharp disagreement among the parties over the proper construction of the net billing agreements and over the question of the

authority of the participants to enter into them, as well as on other matters. Both courts below acknowledged that the controversy was real. The posture of the case was both concrete and adversarial.

Petitioners' actual complaint is not that there was no real controversy, but only that the court, if it had received additional evidence, might have decided the controversy before it differently. Yet, as shown above, if that additional evidence was relevant the petitioners had ample opportunity to produce it.

In the absence of any showing that the provisions of the bond resolutions were relevant to the construction of those portions of the net billing agreements which determined the outcome of this case, there was no reason why the district court should not have proceeded, as it did, to enter its declaratory ruling.

When they entered this case petitioners were on notice of the management schedule which had been set by the court. The court was certainly entitled, when allowing permissive intervention, to require the intervenors to adhere to that schedule so as not to delay the litigation. They were specifically offered an opportunity to identify any issues of fact relevant to the summary judgment motions which might have required further discovery (Petition, Appendix D). Although they did ask for discovery, they identified no such factual issues.[1]

The petition for certiorari boils down to a complaint that the district court

---

[1]Each category of documents as to which petitioners sought discovery was described as relating to legal rather than factual issues. For the most part, with the exception of the bond resolutions, petitioners believed those documents would disclose opinions of other persons concerning legal issues (Excerpt 1015-1027).

abused its discretion in its management of the case. District courts have broad discretion both when ruling on requests to intervene, *Shump v. Balka*, 574 F.2d 1341, 1345 (10th Cir. 1978), and authorities there cited, and when ruling on discovery matters. *In Re Multi-Piece Rim Products Liability Lit.*, 653 F.2d 671, 679 (D.C. Cir. 1981), and authorities there cited. No abuse of that discretion has been shown here.

CONCLUSION

Petitioners have not shown that the district court abused its discretion in this case. No other issue is presented.

The petition for certiorari should be denied.

Respectfully submitted,

SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
JAY T. WALDRON
MILDRED J. CARMACK

By: _____
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Counsel of Record for
Above-Named Respondents

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No. 85-445 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1985

PETER DEFAZIO, et al,
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v.

THE CITY OF SPRINGFIELD,
by and through
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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners assert that this case involves issues of jurisdiction and trial court discretion. The underlying issue, however, is whether the trial court properly addressed and decided a question of contract interpretation, namely, who has the risk of loss under certain agreements.

No. 85-445

In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE
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FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT [1]

The Ninth Circuit ruled on a question of contract interpretation relating to certain agreements involving utilities in the Northwest. In the early 1970s, the Washington Public Power Supply System ("Supply System"), the Bonneville Power Administration ("BPA"), and more than 100 municipalities and public utility districts in Oregon, Washington, Wyoming, Idaho, Montana, and Nevada ("participants") entered into three-party agreements ("net billing agreements") in connection with the construction of three nuclear power plants to be built by Supply System in Washington. A fourth plant, built in Oregon by Portland General Electric Co., an investor-owned utility, also involved a form of net billing agreement. That plant, as well as one of the Supply System plants, has been completed; both are furnishing power to Northwest utilities.

The ultimate issue in this litigation was the authority of the participants to enter into the net billing agreements. The major question underlying that issue was whether the participants or the BPA had assumed the "dry-hole" risk as to the plants. In other words, who has to pay if the plants are never completed or never produce power?

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[1] Respondents, A Group of Washington Utilities, are identified in prior proceedings. None of these entities has any parent company, subsidiary, or affiliate.

The trial court held that the "dry-hole" risk rested with the BPA. The Ninth Circuit affirmed.

The decision of the Ninth Circuit is not in conflict with any decision of any other Court of Appeals or with any decision of a state court of last resort. Nor did the Ninth Circuit rule on any important and unsettled issue of federal law. Rather, on the basis of the specific facts before it, the Ninth Circuit interpreted a particular set of agreements. Because of the unique nature of the net billing agreements, the facts involved here are unlikely to arise again. The decision of the circuit court does not merit Supreme Court review.

This Court has twice declined to review the rulings of state supreme courts regarding agreements between the Supply System and participants. *Chemical Bank* v. *Wash. Pub. Power Supply*, 102 Wash 2d 874, 691 P2d 524 (1984), cert denied sub nom *Chemical Bank* v. *Public Utility District No. 1*, — US —, 85 L Ed 2d 510, 105 S Ct 2154 (1985); *Asson* v. *City of Burley*, 670 P2d 839 (Idaho 1983), cert denied sub nom *Chemical Bank* v. *Asson*, — US —, 83 L Ed 2d 149, 105 S Ct 219 (1984). Those agreements concerned two additional nuclear power plants which were to be built by the Supply System in Washington. The Court likewise should leave in place the lower court ruling in this instance. To do otherwise would be to cast into doubt the legality of the net billing agreements and play havoc with power planning in the entire Northwest region.

The petition for a writ of certiorari should be denied.

Respectfully submitted

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v.

CITY OF SPRINGFIELD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred by denying petitioners' request for discovery.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 752 F.2d 1423. The opinions of the district court are reported at 564 F. Supp. 86 and 564 F. Supp. 90.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 1A-2A) was entered on February 4, 1985. A petition for rehearing was denied on May 16, 1985. The petition for a writ of certiorari was filed on August 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]Petitioners did not file an appendix to the petition for a writ of certiorari containing the opinions of the courts below. The petition accordingly does not comply with Rules 21.1(k)(i) and (ii) of the Rules of this Court. See also Rule 21.2 ("[t]he Clerk shall not accept any petition for writ of certiorari that does not comply with this Rule and with Rule 33").

STATEMENT

1. This action concerns the validity of contracts for the purchase and sale of electricity produced by three nuclear power plants in the Pacific Northwest. The power plants, which are being constructed by the Washington Public Power Supply System (WPPSS), are referred to as Projects 1, 2, and 3. The parties to the contracts are the WPPSS; the Bonneville Power Administration (BPA); and more than 100 local entities, including cities, public utility districts, and cooperatives. 752 F.2d 1425.[2]

Pursuant to these contracts, termed "net billing agreements," the Bonneville Power Administration purchased all of the electric power produced by Projects 1, 2, and 3, in order to secure a source of power to satisfy its customers' future energy needs.[3] Each local entity purchased from the WPPSS a share of the electricity to be generated by Projects 1, 2, and 3. In general terms, the agreements assign to the BPA the local entities' rights to the power produced by these projects. The BPA, in turn, guarantees the repayment of the cost of financing and constructing the projects. The BPA sells power to each local entity for which it bills the local entity on a monthly basis. The BPA credits the local entity's account in an amount equal to the monthly payment made by the local entity to the WPPSS for its share of the project. The credit arrangement is the "net billing" established by the agreements. 752 F.2d at 1425.

This litigation was precipitated by a controversy involving two other nuclear power plants sponsored by the WPPSS—Projects 4 and 5. The scheme governing the

---

[2]A fourth agreement among these parties, relating to the Trojan Nuclear Project, is not in dispute here.

[3]The BPA is responsible for marketing both hydroelectric power produced by certain federal projects in the Pacific Northwest and power purchased by the BPA from other producers (752 F.2d at 1425).

disposition of power produced by those projects is completely different from the net billing arrangement at issue here. Moreover, the contracts relating to Projects 4 and 5 involve only the WPPSS and certain cities and local utilities; the BPA is not a party. Construction of Projects 4 and 5 was abandoned in 1982, and questions arose concerning the obligation of the cities and utilities to repay the cost of the projects' construction and financing. 752 F.2d at 1426, 1429. Several state courts reached different conclusions regarding the local entities' authority to enter into the relevant contracts. See *Chemical Bank* v. *WPPSS*, 102 Wash. 2d 874, 691 P.2d 524 (1984), cert. denied, No. 84-1258 (Apr. 29, 1985); *Asson* v. *City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983), cert. denied, No. 83-1619 (Oct. 1, 1984); *DeFazio* v. *WPPSS*, 296 Or. 550, 679 P.2d 1316 (1984). The courts that held that the local entities lacked authority to enter into the contracts relied in part upon the fact that the local entities bear the "dry-hole risk" under these contracts, *i.e.*, the local entities would be required to repay the costs of the projects even if the projects were not built and no electricity was produced. See *Chemical Bank*, 102 Wash. 2d at 892, 691 P.2d at 535; *Asson*, 105 Idaho at 437, 440, 443, 670 P.2d at 844, 847, 850.

2. On November 15, 1982, the City of Springfield, Oregon—one of the local entities that is a party to net billing agreements relating to Projects 1, 2, and 3—brought an action in the United States District Court for the District of Oregon seeking a declaratory judgment that the net billing agreements are valid and enforceable. The City of Springfield alleged that uncertainty existed with respect to its authority to enter into the net billing agreement because an Oregon state trial court had held that the contracts relating to Projects 4 and 5 were unenforceable. The city joined as defendants all signatories to the net billing agreements. 752 F.2d at 1426. Petitioners, electric utility ratepayers in the City of Springfield, filed a motion to intervene,

and their motion was granted on March 29, 1983. They asserted that the agreements were invalid and unenforceable.

The district court granted summary judgment in favor of the City of Springfield, and issued an order declaring the net billing agreements to be valid. The court first stated that the agreements were governed by federal common law. Observing that the utilities "pay only for the power they use", and that "[t]he risk of a 'dry-hole' " lies with the BPA, the court found that "[t]he utilities entering into these agreements thus merely entered into authorized contracts for power" (564 F. Supp. at 95). It held that "all signatories to the net billing agreements had authority to enter into these federal contracts" (*ibid.*).

3. The court of appeals unanimously affirmed. The court specifically rejected petitioner DeFazio's claims that "the case was not properly decided because of the lack of a fully developed adversarial record" and that "the trial court erred by denying discovery" (752 F.2d at 1427). The court found that petitioner DeFazio "did not identify any questions of fact that would have prevented summary judgment. He questioned the participants' authority under state law. The district court correctly ruled that the dry-hole risk rested with the BPA. As a result, there are no factual issues which need to be resolved. A request for discovery may be denied when it is not relevant to the issues presented on a motion for summary judgment" (*ibid.*).

On the merits, the court concluded that "[a] review of the agreements without reference to either state or federal law confirms the reasonableness" of the district court's conclusion that the agreements "placed the dry-hole risk on the BPA" (752 F.2d at 1427). The court held that state law governs the authority of the public entities to enter into the agreements (*id.* at 1428). It found that the agreements constituted "contract[s] for the purchase of electricity" and that

state law authorized the public entities to enter into such contracts.[4] It concluded that the district court had properly declared the agreements to be enforceable. *Id.* at 1429.

ARGUMENT

The sole question presented in this case is whether the district court erred in denying petitioners' request to engage in discovery. The court of appeals correctly rejected this claim, and its determination does not conflict with any decision of this Court or another court of appeals. Review by this Court of petitioners' wholly fact-bound claim is not warranted.

1. Although petitioners present three questions in their petition, all three questions are grounded in a single claim: that the district court erred by denying petitioners' request for discovery.[5] Since that issue is inextricably tied to the specific facts of this particular case, the petition obviously presents no legal question of general significance warranting review by this Court.

2. Moreover, the court of appeals' decision is correct. In order to establish that the district court erred in denying their request for discovery, petitioners must show that the proposed discovery concerned a question of fact relevant to the issue presented by the motions for summary judgment granted by the district court. Cf. Fed. R. Civ. P. 56(c) (summary judgment appropriate if "there is no genuine

---

[4]The court of appeals noted "several key differences" between the net billing agreements at issue here and the contracts relating to Projects 4 and 5 that were held unenforceable in state-court litigation, including the fact that the net billing agreements allocate the dry-hole risk to the BPA (752 F.2d at 1429).

[5]The first two questions presented in the petition concern the alleged inadequacy of the record before the district court; petitioners assert that the record was inadequate because the district court denied their request for discovery (see Pet. 11, 13).

issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law"). Since the summary judgment motion decided by the district court concerned only the legal issues of the proper interpretation of the net billing agreements and the parties' authority to enter into those agreements, petitioners obviously cannot make such a showing.

Petitioners argue that the district court should have granted discovery of the WPPSS bond resolutions relating to the construction of Projects 1, 2, and 3, asserting that these documents are "essential to the characterization of the net billing agreements because they provide the mechanism under which the Supply System was obligated to use its best efforts under the net billing agreements to finance nuclear plants 1, 2 and 3" (Pet. 11-12). Petitioners also state that "this financing aspect" was relied upon in the state court decisions finding the agreements regarding Projects 4 and 5 unenforceable (*id.* at 12). Petitioners' argument thus appears to be that the bond resolutions somehow might show that the net billing agreements suffered from the defect found by some state courts in the agreements relating to Projects 4 and 5—the allocation of the dry hole risk to the local entities (see *id.* at 8-9).

However, both courts below correctly concluded that the net billing agreements clearly "placed the dry-hole risk on the BPA." 752 F.2d at 1427; 564 F. Supp. at 95. Since the agreements are absolutely clear with respect to this issue, the bond resolutions could not have altered the interpretation of the net billing agreements adopted by the courts below. The court of appeals correctly concluded that "there are no factual issues which need to be resolved" through discovery (752 F.2d at 1427).[6]

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[6]Of course, petitioners have made no showing that the bond resolutions provide any support for a contrary interpretation of the net billing agreements. See Pet. 8-9 ("[t]he impact of the bond resolutions upon the

In addition, petitioners failed to preserve their discovery claim. Rules 56(e) and (f) of the Federal Rules of Civil Procedure require a party opposing a motion for summary judgment to submit affidavits that either "set forth specific facts showing that there is a genuine issue for trial" or demonstrate that the party "cannot for reasons stated present by affidavit facts essential to justify his opposition." The district court's trial management order in this case similarly required petitioners to "stat[e] with specificity the facts outstanding [that preclude summary judgment]" (Pet. App. 2D). Petitioners failed to comply with both of these requirements. Indeed, even now petitioners are unable to show how the bond resolutions could possibly create a dispute regarding a fact material to the legal issues decided by the court below. For this reason, too, petitioners' claim is completely without merit.[7]

---

agreements *may* characterize the net billing agreements as a device for the security of bonds rather than a power sales agreement") (emphasis added). This vague statement plainly is insufficient to justify this Court's extraordinary intervention into what is a completely factual dispute.

Petitioners appear to argue (Pet. 16-17) that the court of appeals' determination that the agreements were governed by state law somehow revived their discovery claim. However, since the court of appeals noted that the meaning of the contracts was clear without reference to either state or federal law (752 F.2d at 1427-1428), the court of appeals' decision to apply state law could not have affected the interpretation of the contracts. Similarly, the application of a different legal standard in assessing the authority of the parties to enter into the agreements could not create a factual issue justifying petitioners' discovery request.

[7]Petitioners appear to argue (Pet. 14-15) that they were prejudiced by the schedule adopted by the district court. However, petitioners participated in the scheduling discussions held prior to the granting of their request to intervene. Moreover, the schedule established by the district court gave petitioners ample opportunity to present their views, permitting them to file both an opening brief and a reply brief (Pet. App. 1D-2D).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1985

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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PETER DEFAZIO, ET AL, PETITIONERS,

V.

THE CITY OF SPRINGFIELD BY AND
THROUGH THE SPRINGFIELD UTILITY BOARD, ET AL.

SUPPLEMENTAL APPENDICES

TO

WRIT OF CERTIORARI

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CITY OF SPRINGFIELD

V.

WASH. PUBLIC POWER SUPPLY

Cite as 752 F.2d 1423 (1985)

Before KENNEDY and FERGUSON, Circuit Judges, and WILLIAMS, * District Judge.

FERGUSON, Circuit Judge:

This case involves a challenge to the validity of several contracts to construct and distribute power from nuclear power plants among (1) a number of Oregon, Washington and Idaho cities and public utility districts (the participants). (2) the Washington Public Power Supply System (Supply System or WPPSS), and (3) the Bonneville Power Administration (BPA). The district court rejected the argument that the participants lacked authority under local state law to enter into such agreements and upheld them under federal common law. We affirm, but with certain modifications.

FACTS

Congress established the BPA to serve as the federal marketing agency for

electric power produced in the Pacific Northwest. 16 U.S.C. § 832 et seq. The BPA acquires hydroelectric and other power and distributes it to utility companies and other customers. WPPSS is a municipal corporation and joint operating agency under Washington law. Wash.Rev.Code § 43.52. It is an association of nineteen Washington public utility districts and four Washington cities, formed to finance, construct, own and operate electrical generating facilities.

In the early 1970s, the BPA entered into a series of three party contracts with various public utilities and WPPSS to build and distribute electricity from four nuclear power plants. These plants were designated the Trojan Nuclear Project and WPPSS Nuclear Projects 1, No. 2 and No. 3. The agreement relating to each project is an identical three-party contract consisting of a "Project Agreement" and a "Net Billing Agreement." The "Project Agreement" provides "for financing, construction, ownership and operation"

of the plant and is executed by WPPSS and the BPA. The "Net Billing Agreement" provides for the distribution of electricity to the participants through BPA. A declared purpose of the net billing agreement is to "pool electric power and energy acquired hereunder with other power available to the (BPA) Administrator from the Federal Columbia River Power System so that any costs or losses associated with acquiring such power and energy will be borne by the (BPA) Administrator's ratepayers through rate adjustments if necessary." By such pooling, the effect of an unexpectedly great cost can be diluted by the use of cheaper and readily available energy from other sources.

The participants under the net billing agreements agreed to use a share or percentage of the electricity generated by the plant. The cost of that share is computed by milti-plying the participant's share by the amount of the annual budget (less funds payable from

other sources). This cost is reflected in the "Billing Statement" prepared by WPPSS and must be paid by the participant "whether or not the Project is completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the Project output."

The participants do not receive their share of the power produced by the plant directly, however. They "assign" the power to the BPA, which pools it with its other sources of power. The BPA then provides the participant with the amount of electrical power they need, and deducts the amount the participants paid directly to WPPSS from the cost of the power delivered by BPA. Should the amount the participant paid to WPPSS exceed the cost of electricity actually delivered by BPA, the accumulated balance in favor of the participant "shall be paid in cash" to the participant by BPA, "subject to the availability of appropriations for such purposes."[1] The BPA Administrator

is also authorized to "use his best efforts" to assign a participant's excess share to another BPA customer.

In 1976, WPPSS entered into two-party contracts with certain Northwest cities and utilities to construct and sell power from two additional nuclear power plants--Projects 4 and 5. Those two-party contracts do not involve the BPA. They [the Projects' 4 and 5 two-party contracts] require the cities and utilities to pay their percentage of the costs specified in the contracts, and to receive their percentage of the power directly from WPPSS, even if the amount of power received is zero. Construction of Projects 4 and 5 was abandoned in 1982, and the local entities became obligated under the contracts to pay their percentage of the costs even though they were receiving no power and no power could be produced. The supreme courts of Washington and Idaho subsequently held that these two-party contracts could not be enforced against the

local utilities and cities as the contracts were not properly executed or exceeded the authority of the cities or utilities. Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983); Chemical Bank v. WPPSS, 99 Wash.2d 772, 666 P.2d 329 (1983). The Oregon Supreme Court issued an opinion on March 20, 1984 holding that Oregon local utilities acted within their authority in executing the two-party agreements with WPPSS, DeFazio v. WPPSS, 296 Or. 550, 679 P.2d 1316 (1984).

This case was brough by the City of Springfield, Oregon, and sought a declaratory judgment that it either had "full legal authority to enter into the (three-party) Net Billing Agreements on Projects 1, 2, 3 and Trojan by reason of Bonneville's obligations thereunder," or that, if it did not have authority to enter into the agreements, "Bonneville is liable to Supply System to make such payment and estopped to claim its lack of obligation to do so." The complaint was brought after the decision

of an Oregon trial court which, in agreement with the courts of Washington and Idaho, held the two-party contracts for Projects 4 and 5 unenforceable. The Oregon Supreme Court has since reversed that court, DeFazio v. WPPSS, supra.

The City of Springfield joined as defendants all local participants in the net billing agreements, WPPSS and BPA. Springfield ratepayers, represented by Peter DeFazio, intervened, arguing that the case did not present "a genuine justiciable controversy" until the appeal of the Oregon trial court decision was decided and, in the alternative, that the city lacked authority to enter into the net billing agreements.

On a motion for summary judgment decided before the Oregon trial court was reversed, the district court upheld the validity of the net billing agreements and the authority of the local participants to execute them. City of Springfield v. WPPSS, 564 F.Supp. 90 (D.Or.1983). The Court states that "because BPA, a federal agency, has assumed the 'dry-

hole' liability as to WPPSS plants 1, 2 and 3 the net billing agreements are contracts with the federal government whose interpretation is a matter of federal, not state concern." Id. at 93-94. The court then concluded: "The utilities entering into these agreements thus merely entered into authorized contracts for power. If no power is provided, no power is paid for. There is no infirmity in this arrangement." Id. at 95.

ISSUES

1. Is there a justiciable controversy involving all partes?

2. Was the case decided on an adequate record or did thecourt err in denying discovery?

3. Did the district court correctly conclude that "federal common law" controlled?

4. Under the applicable law, did the signatories to the net billing agreements act within their legal authority?

DISCUSSION

1. Was There a Justiciable Controversy

Involving All Parties?

(1) In its complaint, the City of Springfield joined all signatories to the net billing agreements because those parties might be affected by a declaration that the City of Springfield lacked authority to enter the agreement. The agreements provided that each participant's share would automatically be increased prorata up to a specified maximum in the event any other participant failed to perform. The BPA cross-claimed against all signatories, alleging that all parties had the requisite authority to execute and perform those agreements. Several appellant public utility districts admitted that they had such authority and moved to be dismissed. They argue that there is no justiciable controversy and the district court's declaratory judgment was an advisory opinion as to them.

First, we find that there is an actual controversy as to the City of Springfield's authority to enter the agreement by virtue of

the position asserted by the intervenors challenging that authority. While it appears to us that there was a case or controversy at the outset, the alternate position of the intervenor that the cities lacked authority to enter into the net billing agreements resolves any doubt on that point. See INS v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); Associated General Contractors of America v. Laborers Internationsl Union, 476 F.2d 1388, 1402-03 (Tem.Emer.Ct.App. 1973). In addition, the parties have taken different positions on the issue of the validity of the agreements, on whether the agreements are governed by federal or by state law, and on whether abstention is appropriate.

Moreover, all parties would be affected by the invalidity of the agreement of any other partey; a massive reshuffling of rights and obligations would result from invalidation of any of the agreements. This factor makes the joinder of all signatories desirable even

if not indispensable, and the court could properly issue a judgment binding on all. See, e.g., Fed.R.Viv.P. 20.

2. Was the Case Decided On An Adequate Record? Did the Court Err in Denying Discovery?

DeFazio raises two related arguments: first, that the case was not properly decided because of the lack of a fully developed adversarial record; and, second, that the trial court erred by denying discovery.

(2,3) DeFazio did not identify any questions of fact that would have prevented summary judgment. He questioned the participants' authority under state law. The district court correctly ruled that the dry-hole risk rested with the BPA. As a result, there are no factual issues which need to be resolved. A request for discovery may be denied when it is not relevant to the issues presented on a motion for summary judgment. St. Louis Union Trust Co. v. United States, 617 F.2d 1293, 1299-1300 (8th Cir. 1980).

3. Did the District Court Correctly Conclude That "Federal Common Law" Controlled?

As some of the parties have pointed out, there are two separate issues in this case The first issue is one of contract construction Do the net billing agreements place the dry-hole risk on the BPA or on the participants? The interpretation of a contract is ordinarily made by reference to the terms of the contract itself. See Ayres v. Prudential Insurance Co., 602 F.2d 1309, 1312 (9th Cir. 1979). "Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning. Restatement (Second) of Contracts § 201(1) 1981). "[T]he primary search is for a common meaning of the parties, not a meaning imposed on them by the law." Id. comment c.

(4) In this case the district court, in accordance with the intent of the parties to the net billing agreements, held that the contract placed the dry-hole risk on the BPA.

It found that the participants will receive a credit from the BPA equal to its payment to WPPSS or receive a cash refund. A review of the agreements without reference to either state or federal law confirms the reasonableness of this interpretation. As the agreement are the same for all signatories, irrespective of their state of origin, the same interpretation should apply. There is no reason to fear that inconsistent interpretations of the agree ment will result from various state laws as th agreement itself is clear and requires no implied-in-law guidelines to interpretation.

(5) The second issue presented is whether the various local participants acted within their legal authority inexecuting the net billing agreements. The district court apparently applied "federal common law" to thi issue. As in United States v. Little Lake Misere Land Co., 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973), there is no specific federal legislation mandating that state or

particular federal law control the BPA net billing agreements. See id. at 593, 93 S.Ct at 2397. Thus federal courts must "fashion the governing rule of law according to their own standards." Id. at 594, 93 S.Ct at 2397-2398 (quoting Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67, 63 S.Ct 573, 574-75, 87 L.Ed. 838 (1943)). Relevant state law must be identified in order to determine whether it should be borrowed or it it would be "aberrant or hostile" to the federal program involved. Little Lake Misere, 412 U.S. at 596, 93 S.Ct. at 2398; United States v. Med O Farm, Inc., 701 F.2d 88, 90 (9th Cir. 1983); United States v. California, 655 F.2d 914, 917 (9th Cir. 1980). Choice of law "depends ultimately and exclusively on the nature of the issue involved and the significance of the specific federal interests in the resolution of the (dispute)." 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 4514 at 274 (1982).

(6) In this case the City of Springfield sought a declaration that it either did or did not act within its legal authority in entering into the three-party net billing agreements. The Oregon trial court (reversed on appeal), the Washington Supreme Court in Chemical Bank v. WPPSS, 99 Wash.2d 772, 666 P.2d 329 (1983) and the Idaho Supreme Court in Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983), had held that their local utilities and cities were not authorized to enter into the two-party contracts for WPPSS Projects 4 and 5 (which did not include the net billing arrangement with BPA) due to state constitutional or statutory debt limitations. In order to determine whether the City of Springfield acted within its authority, or had the "capacity" to enter the contract, the limits of the city's authority must be ascertained. The state's interest in ascertaining and applying state law in this area is great as a local government's authority goes directly to "the State's freedom to structure

integral operations in areas of traditional governmental functions." National League of Cities v. Usery, 426 U.S. 833, 852, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976). See Bambu Sales, Inc. v. Gibson, 474 F.Supp. 1297, 1301 (D.J.J. 1979).

(7) The federal interest, which must be balanced against the state interest, United States v. California, 655 F.2d at 917, is two-fold. First, the federal government has an interest in enforcing its contracts. However, the Supreme Court in United States v. Yazell, 382 U.S. 341, 86 S.Ct 500, 16 L.Ed.2d 404 (1966), rejected the government's argument that there is an "overriding federal interest" in the "unlimited right of the Federal Government to choose the persons with whom it will contract." Id. at 349 & n. 19, 86 S.Ct. at 505 & n. 19. The enforcement of the contracts alone is not a strong enough federal interest to overcome the essential state interest in defining the scope of local governmental authority. The other federal interest recognized

by the district court is one of uniformity. 564 F.Supp. at 94. However, in Yazell, the Court found no problem in applying the different laws of the states to local matters, such as the capacity to contract, particularly when the contract at issue is adapted "specifically and in great detail" to the state law. 382 U.S. at 357, 86 S.Ct. at 509.

In this case the net billing agreement were developed for use in the Pacific Northwest Given the regional nature of the BPA and its intimate involvement in the local distribution of electricity, it would seem that whatever contracts it makes with local governments should be made with reference to the relevant local laws. Once the terms and obligations of the agreements themselves are uniformily interpreted, the authority of the various local governmental units to enter into them is a matter of local law.

4. Under Applicable Law, Did the Participants Act Within Their Legal Authority?

(8) The net billing agreements are sufficiently different from the two-party contracts for WPPSS Projects 4 and 5 to require a separate analysis. DeFazio v. WPPSS 679 P.2d at 1321-22; Asson v. City of Burley, 670 P.2d at 841-42; Chemical Bank v. WPPSS, 666 P.2d at 332-33. Before undertaking that analysis, it is worthwhile to note several key differences in the three-party net billing agreements. They are: (1) although the participants are obligated to pay WPPSS regardless of whether they receive power from the plants, they receive either credit for those payments for power actually supplied by BPA or a refund from BPA; (2) there are provisions for shifting the debt to other BPA users in the event a participant no longer needs the power from WPPSS; (3) electric rates are not directly tied to a particular plant's expenses as BPA pools electrical power from various sources to determine rates; and (4) the dry-hold risk is not borne exclusively or primarily by the local

participants. (It may be borne by them indirectly if BPA raises its rates to cover its liability. On the other hand, BPA may receive appropriations to cover some costs associated with the expense of nuclear power.)

Because the net billing agreements place the dry-hole rist on the BPA, and not on the local participants, and because the local participants will receive either electricity or a cash refund equal to their payments to WPPSS, the district court was correct in finding that this arrangement is in fact a contract for the purchase of electricity. None of the participants have argued that they lack authority to enter into such contracts, indeed, the raison d'etre of the utilities, at least, is to provide electricity. The parties have conceded that they are authorized under local law to enter into contracts to purchase electricity.

CONCLUSION

The local participants did not exceed their authority by entering into the net bill-

ing agreements with BPA and WPPSS. Although the district court erred in declaring the participants' authority to be defined by an amorphous federal common law, it reached the right result.

(9) One other aspect of the district court's opinion needs clarification. The district court stated that "the United States bears the financial risk if the plants do not purchase power." 564 F.Supp. at 95. However, it also noted that the United States' liability was "potential," and that it is the BPA which, as a party to the contract, bears the financial risk. 564 F.Supp. at 94 n. 1. The issue of whether it is the BPA or the United States which bears the contractual liability under the agreement is not now before us and we therfore do not address that issue. With that clarification the district court is AFFIRMED.

* Honorable David W. Williams, Senior United States District Judge for the Central District of California, sitting by designation.

FOOTNOTES

1. In its brief, the Bonneville Power Administration has noted that appropriations for this purpose may be provided pursuant to 16 U.S.C. § 838i(a), (b)(6)(ii).

The CITY OF SPRINGFIELD, a municial corporatio acting By and Through the SPRINGFIELD UTILITY BOARD,

Plaintiff

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation; City of Eugene, Bonneville Power Administration, an agency of the United States Government; Peter Johnson, Administrator of the Bonneville Power Administration, et al,

Defendants.

Civ. No. 82-1387-RE

United States District Court

D. Oregon.

March 15, 1983.

City, through its utility board, brought declaratory judgment action against various federal defendants, utilities, and cities stemming from contracts relating to construction of three nuclear plants and allocation of power from those plants after their completion. On motion by certain defendants to dismiss, the District Court, Redden, J., held that: (1) District Court had jurisdiction over the action; (2) issue

of justiciability was to await litigation of merits of the controversy; (3) Court had personal jurisdiction over out-of-state movants; and (4) venue was proper.

Motions denied.

OPINION

REDDEN, District Judge:

This is a declaratory judgment action brought by the city of Springfield, Oregon, against the Washington Public Power Supply System (WPPSS), the Bonneville Power Administration (B)A), and over a hundred utilities and cities in Oregon, Washington, Wyoming, Idaho, Montana and Nevada. This litigation stems from contracts, commonly known as "net billing agreements," entered into by BPA, WPPSS and the named utilities, including plaintiff. Those contracts relate to construction of three nuclear plants, WPPSS plants 1, 2 and 3, and the allocation of power from those plants after their completion. Plaintiff seeks a declaration that it had

lawful authority to enter into the net billin agreemnts. Plaintiff alleges that uncertaint has arisen on this issue, and that that uncertainty has been increased by the decision in DeFazio v. WPPSS, Lane County Circuit Court No. 16-81-11344[1] which held that certai utilities lacked authority to enter into contracts concerning WPPSS plants 4 and 5. Plaintiff is also a participant in the Trojan nuclear plant in Rainier, Oregon. which has already been completed. Plaintiff argues that there is uncertainty concerning the participation agreement which it signed in order to take part in the Trojan project.

BPA and other federal defendants have filed a cross-claim in this litigation. For purposes of the cross-claim the federal agencies and officers appear as plaintiffs pursuant to 28 U.S.C.§ 1345 and 16 U.S.C. §832k(b). The cross-claim seeks a declaratio that all participants had lawful authority to enter into the net billing agreements.

Certain defendants now move to dismiss under Fed. R. Civ. Pro. 12(b). The movants assert, first, a lack of federal subject matter jurisdiction over this suit. Next, movants assert that there is no justiciable controversy among these parties. Finally, certain out-of-state defendants move to dismiss on the gounds of lack of personal jurisdiction over them, or improper venue.

Federal Statutory Jurisdiction

(1) This suit is properly brought in federal court. Plaintiff seeks to ground jurisdiction in 28 U.S.C. § 1331, by alleging that its action against a federal agency concerning its contracts requires the application of federal common law, which indicates that this action "arises under" federal law. Plaintiff is correct. When federal common law governs an action, the action "arises under" federal law for purposes of 28 U.S.C. § 1331. Illinois v. City of Milwaukee, 406 U.S. 91, 100 92 S. Ct 1385, 1391, 31 L.Ed.2d

712 (1972). Federal common law governs this case, because it is an action against the federal government which could have an impact upon the federal treasury and in which there is an urgent need for the application of a uniform rule. United States v. Seckinger, 397 U.S. 203, 209-210, 90 S.Ct. 880, 884, 25 L.ed.2d 224 (1970); Clearfield Trust Co. v. United States, 318 U.S. 363, 367, 63 S.Ct. 573 575, 87 L.Ed. 838 (1943); see also United States v. Allegheny County, 322 U.S. 174, 183, 64 S.Ct. 908, 913, 88 L.Ed. 1209 (1944); Ghent v. Lynn, 392 F. Supp. 879, 881 882 (D. Conn. 1975); Marcus Garvey Square v. Winston Burnett Const., 595 F.2d 1126, 1132 (9th Cir. 1979) (Dictum).[2]

(2) In addition, I clearly have jurisdiction over the cross-claim of the United States, see 28 U.S.C. § 1345:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction

> of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer therof expressly authorized to sue by Act of Congress.

Thus I have jurisdiction over the cross-claim of the BPA, which seeks declaratory relief similar to that sought by plaintiff. The course of this litigation will not be affected, whether I assert jurisdiction over only the cross-claim or the entire controversy. However, I find that I have jurisdiction over all claims in this controversy.[3] Therefore I will deny the movants' motions to dismiss for lack of federal subject matter jurisdiction.

Justiciability

(3) Movants assert that there is no real controversy in this case, and that plaintiff and the federal defendants merely seek an advisory opinion as to their rights. It is true that the mere styling of this action as one seeking a declaratory judgment does not

indicate that the matter is justiciable; it is "essential to the maintenance of a declaratory relief action that there be an actual controversy in existence." Garcia v. Brownell, 236 F.2d 356, 357 (9th Cir. 1956), cert. denied, 362 U.S. 963, 80 S. Ct. 880, 4 L.Ed. 878 (1960). "Basically, the question in each case is whether * * * there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Lake Carriers Asso. v. MacMullan, 406, U.S. 498, 506, 92 S.Ct. 1749, 1755, 32 L.Ed.2d 257 (1972), quoting Maryland Gas. Co. v. Pacific Coal, 312 U.S. 270, 273, 61 S. Ct 510, 512, 85 L.Ed. 826 (1941). When all parties to an action "desire precisely the same result," it is clear that jurisdiction is lacking. Moore v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 47, 48, 91 S. Ct. 1292, 1293, 28 L.Ed.2d 590 (1971).

In the present case three defendants

originally denied the validity of the net billing agreements. After briefing of jurisdictional issues began and the justiciability problem became clear, all three filed motions to amend their answers to drop claims of the invalidity of the net billing agreements and therby defeat federal jurisdiction.

(4) The motions for leave to amend will be denied. I find that final ruling on the justiciability of this suit is premature. Many of the defendants have avoided a direct answer to the issue in suit, by answering only that plaintiff "contends" the contracts are valid. It is apparent that certain litigants, taking advantage of the court's scheduling of the motions to dismiss prior to the summary judgment motions on the merits, merely seek to avoid adjudication through artful pleading, without conceding their positions on the merits. In addition, many parties have not answered the cross-claims of the federal parties, or have given evasive

answers. I find that a decision on the justiciability of this action must await the litigation of the merits of the controversy, which will have the effect of determining whether the parties are in fact adverse enought to support federal jurisdiction. I certainly have jurisdiction to determine jurisdiction, see United States v. United Mine Workers, 330 U.S. 258, 291-293, 67 S. Ct. 677, 694-695, 91 L.Ed. 884 (1947), and I therfore order that justiciability will be determined after all memoranda on the merits are filed. Only then can it be determined whether all parties "desire precisely the same result," such that there would be nothing left to litigate.

Personal Jurisdiction

Certain out-of-state movants also assert that personal jurisdiction over them is lacking, in that their contacts with Oregon are insufficient to support jurisdiction in this court.

Plaintiff and the federal parties, however, assert that the movants' execution of net billing agreements and other power contracts with BPA, which is of course located in Oregon, subjects the movants to jurisdiction in Oregon courts. In deciding this motion I of course apply the Oregon rules on personal jurisdiction, see Fed.R. Civ. Pro. 4(3); ORCP 4(A)-(L).

(5) I agree with the movants that their execution of one contract with an Oregon entity is not such "substantial and not isolated" activitiy as to subject the movants to suit in Oregon under ORCP 4(A)(4). However, the same is not true with respect to ORCP 4(1), which grants jurisdiction "in any action where prosecution of the action against a defendant in this state is not inconsistent with the constitution of this state or the Constitution of the United States." There is no argument asserted against jurisdiction based upon the Oregon Constitution, and thus the question

before me is whether jurisdiction over these defendants is consistent with federal due process, see Data Disc, Inc. v. Systems Tech. Assn., 557 F2d 1280, 1287 (9th Cir. 1977); Forsythe v. Overmyer, 576 F.2d 779, 782-783 (9th Cir. 1978). cert. denied, 439 U.S. 864, 99 S. Ct. 188, 58 L.Ed.2d 174 (1978). I find that movants are subject to such jurisdiction.

(6) Movants executed contracts[4] with an Oregon entity, BPA, and should reasonably have anticipated being sued in Oregon on those contracts. The present suit arises out of the execution of those contracts. The movants interjected themselves into this forum by receiving the benefits of doing business here. The exercise of such jurisdiction is clearly reasonable. See Data Disc, supra at 1287-1288. I deny the motions to dismisss for lack of personal jurisdiction. Venue is also proper in this district under 28 U.S.C. § 1391(e), which directs that suit against

a federal agency be brought in a district in which the agency is found or defedant resides. BPA and the other federal parties are resident of this district. In addition, the claim "arose" in this district, see Data Disc, supra at 1289-1290, for purposes of 28 U.S.C. §1391(b).

FOOTNOTES

1. DeFazio has been appealed to the Oregon Court of Appeals. A case raising similar issues, Chemical Bank v. WPPSS, et al., No. 82-2-06840-3 (King Co. Wash. Super. Ct. 1982), is now before the Supreme Court of Washington.

2. The United States is liable under the net billing agreements if any party to this action is found not to have had authority to enter into them. The impact upon the federal tresury from this litigation could potentially be immense. This distinguishes the case of Miree v. DeKalb County, 433 U.S. 25, 29, 30, 97 S.Ct. 2490, 2493-2494, 53 L.Ed.2d. 557 (1977), relied upon by movants. Miree was a case in which the federal government had no stake in the outcome; it was simply an action between private litigants. Id. at 29, 30, 97 S.Ct. at 2493, 2494. Thus there was no need for the fashioning of a uniform federal rule. Id. In the present case there is a

crying need for such uniformity. At this writing a court in Washington has upheld the authority of Washington utilities to enter into such contracts, while a court in Oregon has come to a contrary result as to Oregon utilities. If those decisions are upheld on appeal, the federal government will be potentially liable for the shares of the Oregon participants, but not the Washington participants. Such a result would be absurd and would allow the federal treasury's exposure to turn upon state law in a manner inconsistent with the doctrine of Clearfield Trust, supra; see Id., 318 U.S. at 367, 64 S.Ct. at 575. Movants also rely upon Karlin v. Clayton, 506 F.SUpp. 642, 645, 646 (D.Kan 1981), which appears to be confined to the murky area of misrepresenations in armed forces recruiting endeavors. Karlin may not be consistent with the Clearfield Trust doctrine and in any case is confined to its own facts. On the facts of the present case, federal common law applies.

3. In order to remove any doubt on this point, I hold alternatively that I have jurisdiction over the cross-claim under 28 U.S.C. § 1345 and assert pendent jurisdiction over the plaintiff's claim in order to dispose of this controversy in one action, see United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct 1130, 1139, 16 L.Ed.2d 218 (1966). The United States is clearly acting in its capacity as a plaintiff in bringing its cross-claim pursuant to 28 U.S.C. ¶1345, and thus I have jurisdiction over this controversy in any event, see United States v. State of Illinois, 454 F.2d 297, 301 (7th Cir. 1971). It is also clear that retention of jurisdiction solely over the cross-claim, which would have the same effect, would be proper, Pioche Mines Consol. v. Fidelity-Philadelphia, 206 F.2d 336, 337 (9th Cir 1953), but I find adjudication of all aspects of this controversy will serve important ends of judicial economy.

4. Not all movants are parties to the net billing agreements, although all are parties to contracts of some sort with BPA. Whether these contracts are net billing agreements, participation agreements, or ownership agreements is not relevant to my analysis.

The CITY OF SPRINGFIELD, a municial corporation acting By and Through the SPRINGFIELD UTILITY BOARD,

Plaintiff

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation; City of Eugene, Bonneville Power Administration, an agency of the United States Government; Peter Johnson, Administrator of the Bonneville Power Administration, et al,

Defendants.

Civ. No. 82-1387-RE

United States District Court

D. Oregon.

April 27, 1983

City brought action seeking declaration that it had authority to enter into a net-billing agreement with Bonneville Power Administration and power supply system concerning construction of nuclear power plants. The District Court, Redden, J., held that: (1) suite was justiciable; (2) abstention was not required; (3) federal common-law applied; and (4) all signatories had authority to enter

into the agreements.

Declaration issued.

REDDEN, District Judge:

This action concerns three nuclear power plants whose construction was financed under the terms of net billing agreements between the Bonneville Power Administration (BPA), Washington Public Power Supply System (WPPSS), and more than one hundred utilities in Oregon, Washington, Idaho, Montana, Nevada and Wyoming. The plants known as WPPSS plants 4 and 5, have been terminated in mid-construction, and work has ceased on one of these three plants.

WPPSS plants 1, 2 and 3 share a significant characteristic distinguishing them from WPPSS plants 4 and 5: BPA is a signatory to the contracts governing the financing of thier construction. BPA, a federal agency, has assumed the key role in financing the plants through the mechanism of net billing agreements.

In this action, plaintiff City of Springfield, Oregon, seeks a declaration that it had authority to enter into the net billing agreements. The federal defendants, including BPA, seek a further declaration that all participants had authority to enter into the agreements under their respective state laws. The parties now move for summary judgment.

In deciding these motions, I will address several issues. First, I must decide whether this case presents a justiciable controversy. Second, I must decide whether abstention is appropriate and third, I must decide the merits of the motions for summary judgment. These issues interrelate significantly and it is appropriate to summarize the background and history of this litigation.

BACKGROUND TO THIS LITIGATION AND ITS PROCEDURAL HISTORY

BPA was established in 1937 with the

purpose of developing the Northwet's hydro-electri resources and providing low cost energy to the region. In 1966, forecasts of a rapid growth in the power needs of the Northwest caused BPA to urge the construction of nuclear power plants to fill the projected shortfall in the region's energy needs. Between 1970 and 1973 BPA, its customers and WPPSS executed a series of contracts, called net billing agreements, providing for the construction of the nuclear plants. In 1976, WPPSS commenced construction of two more nuclear plants, WPPSS plants 4 and 5. BPA did not participate in those projects, although 88 Northwest utilities did join WPPSS in "participation agreements" for plants 4 and 5.

The predicted sharp growth in Northwest energy demands failed to materialize. As a result, the region faces the prospect of bond payments for the construction of plants which may never generate saleable power. Litigation, however, has certainly been generated, and

pends in several state courts, as well as in this court. Meanwhile, WPPSS faces the prospect of a financial meltdown.

In DeFazio, et al. v. Washington Public Power Supply System, Lane County Circuit Court No. 16-81-11344, ratepayers of the city of Springfield challenged the authority of their city to enter into the participation agreements underlying dormant WPPSS plants 4 and 5. The ratepayers secured a ruling that forbade Oregon public utilities, including Springfield, from paying WPPSS inorder to retire the debt created by plants 4 and 5. The Lane County Circuit Court ruled that, in entering into the participation agreements without a public vote, the Oregon participants had violated provisions of the Oregon Constitution and various statutes forbidding municipalitites from incurring debt without voter approval. DeFazio, now on appeal, sent a shockwave through the Northwest and the municipal bond markets, because it held that

that Oregon utilities were not liable for the indebtedness for WPPSS plants 4 and 5 and raised the possibility that WPPSS would default on the bonds.

Other litigation, filed in this court, sought a ruling to the effect that DeFazio was wrongly decided and has been dismissed on abstention grounds. That suit, Chemical Bank v. City of Bandon, et al., 562 F.Supp. 704 (D.Or. 1983), concerned WPPSS plants 4 and 5, in which BPA owns no interest.

This suit, by contrast, concerns WPPSS plants 1, 2 and 3, in which BPA does have a crucial role. It is argued that BPA has in fact assumed the "dry-hole" risk as to these plants, that is , the obligation of payment if the plants are never completed or never produce saleable power. Thus, it is argued, the utilities which entered into net billing agreements will not be required to retire debts through the use of their taxing power or general revenue, and this, it is further

argued, distinguishes DeFazio. Moreover, the federal involvement in these plants, and the prospect of federal responsibility if the "dry-hole" risk comes to fruition, arguably requires that federal law, not the law of Oregon or any other state, govern these contracts. See Clearfield Trust v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943); City of Springfield v. WPPSS, et al., 564 F.Supp. 86, (Opinion on motions to dismiss filed March 15, 1983), at n. 2.

A preliminary issue, however, is whether this case is in fact justiciable, and whether abstention is appropriate in deference to the pending appeal of DeFazio. I address these matters first.

THIS SUIT IS JUSTICIABLE; ABSTENTION IS NOT APPROPRIATE

(1) When this suit was originally filed, some parties moved to dismiss on the grounds that there was no "case or controversy" concerning the net billing agreements, or that the

congroversy was not justiciable because the parties to this suit did not have adverse interests. I reserved decision on this issue until litigation of the summary judgment motions on the merits. City of Springfield, supra (Opinion on motions to dismiss).

Since the time of the original argument of those motions some parties have altered their positions and others have entered this suit. At the present time it is clear that far from being a case in which all parties "desire precisely the same result," see Moore v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 47, 49, 91 S.Ct. 1292, 1293, 28 L.Ed. 2d 590 (1971), this is a case in which unanimity on any issue is lacking. Some parties argue that the net billing agreements are markedly different in effect from the participation agreements invalidated by DeFazio. Other parties take the opposite position, arguing that the net billing agreements are identical, in effect, with the

participation agreements, and therefore the either DeFazio was correctly decided and the net billing agreements are invalid or DeFazio was "aberrational," and Oregon utilities did have authority to enter into both kinds of agreements. While some parties argue that federal law governs this case as a result of the federal involvement, others argue that federal law is inapplicable. Some parties argue that abstention is appropriate, others disagree. I conclude that I am faced with a real and justiciable controversy between litigants having adverse interests and asserting adverse positions.

(2,3) A more difficult issue is the question of abstention. I must start from th axiom that a federal court has the general du to decide a case properly before it, subject only to certain limited exceptions. Knudsen Corp. v. Nevada State Dairy Commission, 676 F.2d 374, 376, 378 (9th Cir. 1982). I conclude that this suit is not appropriate for

absention because it does not requie a ruling on possibly doubtful state law issues, and is governed by federal law, see infra. Nor does this case present issues of Constitutional law which could be avoided by a decision on state law issues, nor is this controversy confined exclusively to a special state administrative or judicial body with special expertise. Nor is a state suit pending which would grant the relief sought by plaintiff. See Knudsen, supra at 377-378; cf. Chemical Bank v. City of Bandon, supra. I therefore decline the invitation to abstain.

THIS CASE IS GOVERNED BY FEDERAL COMMON LAW

(4,5) I find that, because BPA, a federal agency, has assumed the "dry-hold" liability as to WPPSS plants 1, 2, and 3, the net billing agreements are contracts with the federal government whose interpretation is a matter of federal, not state concern. The federal involvement in these projects is certainly extensive. BPA has already "net-

billed" more than $1 billion as part of the program for the construction of these plants. BPA admits it is liable for an additional $6 billion to retire the bonds sold to finance the project. Federal Defendants' Reply Brief at 6. BPA's pursuit of the construction of these palnts has repeatedly been affirmed by Congress. See Public Law 91-439, 91st Cong., H.R. 18127 (October 7, 1970), 84 Stat. 890; H.R. Rep. No. 1219, 91st Cong., 2nd Sess. (1970), at 90; see also 16 U.S.C. § 839a (Supp. V) et seq. (1980), the Pacific Northwest Electric Power Planning and Conservation Act, and see also Central Lincoln People's Utility District v. Johnson, 686, F. 2d 708 (9th Cir. 1982), cert. granted, ___ U.S. ___, 103 S.Ct. 1496, 75 L.Ed.2d 928 (1983). Clearly, there is substantial federal interest in the interpretation of the net billing agreements undertaken by BPA to carry out this program.

This program is necessarily one which

involves utilities throughout BPA's multistate service area. There is a need for a uniform interpretation of the agreements in order to avoid possibly inconsistent interpretations under varying principles of the various state laws of the service area. City of Springfield v. WPPSS, supra at n. 2 and accompanying text; Cf. DeFazio v. WPPSS, et al., supra, with Chemical Bank v. WPPSS, et al., No. 82-2-06840-3 (King Co., Wash. Super. Ct., 1983). I rely chiefly on the doctrine enunciated in Clearfield Trust v. United States, supra at 318 U.S. at 367, 63 S.Ct. at 575, in holding that the interpretation of the contracts should not be subject to varying interpretations under state law.[1]

Certain parties appear to rely on United States v. California, 655 F.2d 914 (9th Cir. 1980), in arguing that there is no need for the application of federal common law. To the extent that United States v. California is applicable, I find that it

supports the application of federal rules of decision. In United States v. California, the federal government sued California for damages caused to national forest land by a fire alleged to have been started through the negligence of state employees. The Ninth Circuit noted that this was essentially a local dispute in which there was no need for a uniform federal rule, and no argument that application of a state rule of decision would frustrate a federal program. Id. 920. The Ninth Circuit found no infirmity in the application of a state statute of limitation, enacted to govern a broad class of cases and not directed solely against the federal government, to bar the suit. Id. at 918-920.

I follow the law as enunciated in United States v. California, balancing federal interests against state interests with the balance weighed in favor of the application of state law, but find that the need for a uniform rule, and the need to avoid frustrating an important federal

program, see Id. at 920, rebut the initial presumption that state law should apply, see Id. at 917. I also rely upon NorthDakota v. United States, ___ U.S. ___, 103 S. Ct. 1095, 75 L.Ed.2d 77 (1983), interpreting United States v. Little Lake Misere Land Co., 412 U. S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973) and Clearfield Trust Co. v. United States, supra. I hold that federal law governs the interpretation of federal contracts where otherwise inconsistent interpretations could be placed upon the contracts by the courts of various states composing the BPA service area. Here, the exposure of federal funds—whether held by BPA or the federal treasury—could be affected by that interpretation, and the federal program requires that conflicting state laws not create uncertainties which would impede it in raising funds in the financial markets. See also United States v. Med O Farm, Inc., 701 F.2d 88, 90 (9th Cir. 1983). This case is governed

federal law.

ALL SIGNATORIES OF THE NET BILLING AGREEMENTS HAD AUTHORITY TO ENTER INTO THOSE AGREEMENTS FOR THE CONSTRUCTION OF WPPSS PLANTS 1, 2 AND 3.

(6) The net billing agreements are contracts between the United States, acting through BPA, WPPSS and the Northwest utilities. Under these contracts, utilities buy power from BPA. Instead of paying BPA, however, utilities pay WPPSS, which uses the money to retire bonds issued for the completion of WPPSS plants 1, 2 and 3. Thus BPA "net-bills" for power and those bills are paid to WPPSS as third party beneficiary of the BPA-utility contracts and in satisfaction of WPPSS' rights under the net billing agreements. The risk of a "dry-hole" lies with BPA: if WPPSS plants 1, 2 and 3 are terminated prior to completion (or for that matter after completion) they will not produce power which BPA can sell to utilities. However, BPA will continue to market power to

utilities and utilities will continue to buy it. Utilities wil pay only for the power they use. BPA will either have to "eat" the loss in the sense that the federal government will, in one guise or another, support BPA to the extent of the deficiency, or BPA will have to raise its power rates in order to reimburse itself for excess capacity. In the latter case, the result would be an overall rise in BPA's power rates at some date in the future.

The utilities entering into these agreements thus merely entered into authorized contracts for power. If no power is provided, no power is paid for. There is no infirmity in this arrangement. It is no different from the behavior which two private citizens might enter into for the buying and selling of any commodity. If no commodity is provided there is no duty to pay; the provider of the commodity must necessarily charge a price consonant with the cost of doing business.

There is no unfunded "debt" created, requiring public entities to commit the use of their future taxing or general revenue powers. There is no principle which prevents public entities from contracting for the purchase of power and that is all that occurs under the net billing agreements. Such purchases are encouraged by applicable laws of the United States.[2] Based upon my examination of the net billing agreements, I hold that the United States bears the financial risk if the plants do not produce power. See note 1, supra.

I also find that all signatories to the net billing agreements had authority to enter into these federal contracts.[3] A declaration to this effect shall issue.[4]

FOOTNOTES

1. In City of Springfield v. WPPSS, supra, at n. 2 I noted that the impact of this litigation on the federal treasury could "potentially" be immense. I note that I am not in fact required to decide how BPA could finance its obligation to assume the "dry-hold" risk. In this case I need only decide that BPA bears this liability, and not the method of meeting it. The federal treasury is "potentially" liable, and I take this factor into consideration along with the many other federal interests in the operation of BPA's system, and find that federal law governs. A crucial consideration requiring the application of federal law is the need for uniformity. Even if Oregon appellate courts approve the net billing agreement concept, see note 2, infra, there would still be uncertainty because of potential legal challenges in other states. See Clearfield Turst, supra. Such uncertainty illustrates the need for a uniform federal

rule. See United States v. Calfiornia, supra. at 920. A ruling based upon a source of law which can adjudge the rights of all parties to the net billing agreements is required.

2. See United States Constitution, Article 1, Section 10, see also Central Lincoln People's Utility District v. Johnson, supra. It is not contended by any party that it lacks charter or statutory authority to enter into contracts for power. Cf. Martin v. Oregon Building Authority, 276 Or. 135, 142, 143 and 155, 554 P.2d 126 (1976) (Leaseback arrangement in which state was obligated unconditionally on debts held unconstitutional because would constitute a long term debt requiring use of taxing power). Nor does Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, ___ U.S. ___, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), have any application to this proceeding. The issue in PGE was

whether Congress' passage of the Atomic Energy Act precluded state regulation of nuclear wasters. If., ___ U.S. at ___, ___, S.Ct. at 1722-1729, see also Id. at n. 28. This determination obviously turned upon legislative intent and the special interests of California in economic regulation of energy. Id., ___ U.S. at ___, ___, do not apply to this case, which concerns contracts with the federal government. See Clearfield Trust, supra.

3. I emphasize the narrowness of my holding. I rule only that all signatories had authority to enter into the agreements, and make no ruling with respect to possible claims of estoppel or misrepresentation in connection with the agreements.

4. The Trojan nuclear plant was also financed through the use of net billing agreements.

CERTIFICATE OF MAILING

I hereby certify that the foregoing SUPPLEMENTAL APPENDICES was served this 30 day of December, 1985 by United States Mail, be depositing 1 copy(ies) of said Supplemental Appendices with postage prepaid thereon in the United States Post Office in Springfield, Oregon addressed to each of the following parties:

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